89-449

No. 89-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Petitioners,

v.

CONSTANCE FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court's Commerce Clause decisions evaluating evenhanded, non-discriminatory statutes by balancing the burdens on interstate commerce against the benefits of the local policy can be reconciled with the approach adopted by the Third Circuit, under which only the burdens on "interstate relative to intrastate commerce" are taken into account.

2. Whether a Pennsylvania statute barring state-licensed insurers and sellers of insurance from affiliating with banking, lending, or utility companies violates the Commerce Clause, in view of its extraterritorial effect of compelling national insurance companies to avoid such affiliations anywhere in the country, and its clear purpose and effect of providing protection for local insurance sellers against financially diversified, predominantly interstate competitors.

PARTIES TO THE PROCEEDING

Petitioners are United Services Automobile Association, USAA Casualty Insurance Company, USAA Life Insurance Company, and USAA Annuity and Life Insurance Company.* Respondents are Constance Foster, Insurance Commissioner of the Commonwealth of Pennsylvania, and Intervenors, the Pennsylvania Association of Independent Insurance Agents, John Ulrich, Jr., the Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc.; Charles P. Leach, Jr.; the Pennsylvania Association of Life Underwriters; and Harold E. Alexander.

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* There are no parents, subsidiaries, or affiliates of the named petitioners which are not wholly owned, either directly or indirectly, by one or more of them.

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United Services Automobile Association, USAA Casualty Insurance Company, USAA Life Insurance Company, and USAA Annuity and Life Insurance Company hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals upon which review is sought (App. A, *infra*, 1a-40a) is reported at 874 F.2d 926 (*USAA II*). The opinion of the district court (App. C, *infra*, 45a-66a) (on remand from a previous decision of the court of appeals) is reported at 680 F. Supp. 712.

The previous opinion of the court of appeals (App. E, *infra*, 68a-87a) is reported at 792 F.2d 356 (*USAA I*), and the opinion of the district court from which that appeal was taken (App. F, *infra*, 88a-104a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a) was entered on May 5, 1989. A petition for rehearing and rehearing en banc was denied on June 9, 1989 (App. B, *infra*, 41a-44a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

Title 40, Pa. Stat. Ann. § 281 (also referred to as § 641 of the Pennsylvania Insurance Department Act), provides in pertinent part:

> (b) No lending institution, public utility, bank holding company, savings and loan company or any subsidiary or affiliate of the foregoing, or officer or employe [sic] thereof, may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State either as a broker or as an agent except that a lending institution or bank holding company, subsidiary or affiliate of a lending institution may be licensed to sell credit life, health and accident insurance and to sell and underwrite title insurance in accordance with regulations promulgated by the Insurance Commissioner.
>
> (c) The Insurance Commissioner is authorized to promulgate regulations in order to effectuate the purposes of this section, which are to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers.

STATEMENT

1. Pennsylvania law provides that "[n]o lending institution, public utility, bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing, or officer or employe [sic] thereof, may, directly or indirectly, be licensed . . . as an insurer" in Pennsylvania. 40 Pa. Stat. Ann. § 281(b) (Supp. 1989). As explained in the statute, the purpose of the law is "to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers." *Id.*, § 281(c).

2. United Services Automobile Association and its co-petitioners (hereafter "USAA") are Texas-domiciled insurers duly licensed to transact insurance business in all fifty states, including Pennsylvania. USAA's member-policyholders are present and former officers in the United States armed forces. Like many other large interstate insurers, USAA has long sold its insurance products and services in all fifty states, including Pennsylvania, which is the fourth largest insurance market in the United States.[1] In 1983 alone, USAA received $35,000,000 in premiums from its 40,000 Pennsylvania policyholders. App., *infra*, 70a.

In 1983, USAA, through a subsidiary, applied for and was granted a federal charter from the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation to create and operate a new federal savings bank, to be known as USAA Federal Savings Bank (the "Bank"). The charter was issued and the

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[1] USAA is located in Texas and has no locations or agents stationed in other states; it conducts its interstate insurance business by direct mail and telephone, without use of insurance agents. As a reciprocal interinsurance exchange, it is owned by its policyholders and remits all profits to its member policyholders each year in the form of dividends.

new federal savings bank began operating on December 30, 1983. The Bank is located solely in San Antonio, Texas, and does not sell insurance. It has no Pennsylvania operations, and accepts no deposits from residents of Pennsylvania. App., *infra*, 46a; C.A. App. 49a-51a (*USAA II*).

3. In August 1984, the Pennsylvania Insurance Department notified USAA that its ownership of the Bank in Texas was prohibited by section 641 of the Pennsylvania Insurance Department Act, 40 Pa. Stat. Ann. § 281. App., *infra*, 46a; C.A. App. 148a-149a (*USAA I*). The Department noted that although the Bank's operations were limited to Texas, USAA and its affiliates came within the prohibition of section 281, and thus were in violation of the Pennsylvania law. Thereafter the Department advised USAA that it must divest the Bank or else the Insurance Department would initiate proceedings to revoke the licenses of USAA to transact insurance business in Pennsylvania. App., *infra*, 46a; C.A. App. 128a (*USAA I*).

In late 1984, USAA filed a complaint in the United States District Court for the Middle District of Pennsylvania against the Pennsylvania Insurance Commissioner, seeking to enjoin enforcement of section 281 against it. Shortly thereafter, the Commissioner commenced an administrative proceeding to revoke all of USAA's Pennsylvania insurance licenses. App., *infra*, 46a-47a; C.A. App. 129a (*USAA I*). In 1987, the district court granted the intervention motion of three local associations of independent insurance agents and three named individual agents (App., *infra*, 47a), who pointed out in their intervention papers that they were in the forefront of the passage of section 281, and that they therefore have "a direct interest in its preservation." Motion for Leave to Intervene, at attachment 5 ¶ 14 (June 5, 1987).

Petitioners' federal court complaint challenged, *inter alia*, the application of section 281 to USAA as a viola-

tion of both the Commerce and Supremacy Clauses of the Constitution. USAA filed separate motions for summary judgment on these two points. The district court, after initially deciding the case on other grounds,[2] ultimately ruled that section 281 as applied to ban insurance/banking affiliations outside Pennsylvania violates the dormant Commerce Clause. App., *infra*, 57a-65a.[3] It applied the balancing analysis described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and found that the burdens imposed on interstate commerce by section 281 are clearly excessive in relation to the putative benefits offered in justification of the statute.[4]

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[2] The district court first abstained from exercising its jurisdiction, but that decision was reversed by the Third Circuit. App., *infra*, 68a-87a. That court specifically rejected arguments for abstention pursuant to *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger v. Harris*, 401 U.S. 37 (1971). In so doing, the Third Circuit considered and rejected the argument that the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1982), in conferring on states exclusive control over regulation of "the business of insurance," conveyed the power to enact legislation like section 281. It stated that "[r]egulations such as section 641 [40 Pa. Stat. Ann. § 281] have no part in the business of insurance under McCarran-Ferguson," because "affiliation between insurers and banks has no integral connection to the relationship between insured and insurer; and banks are not entities within the insurance industry" (App., *infra*, 81a). This Court denied the Commissioner's petition for certiorari from the Third Circuit's decision on the abstention issue. App., *infra*, 67a.

[3] The district court also concluded that it was bound by the appellate court's prior decision finding abstention inappropriate, and rejected USAA's contention that section 281 is preempted under the federal banking laws. App., *infra*, 47a-57a.

[4] The district court proceeded with its balancing analysis notwithstanding its observation (App., *infra*, 57a n.6) that

> USAA does not argue that the Pennsylvania law discriminates against interstate commerce in favor of local business. Indeed, it could not make such an argument because Section 641(b) [§ 281(b)] treats all insurance companies and all savings and loans alike, whether or not they are based in Pennsylvania.

After reviewing the justifications of the statute as offered by the Commissioner and intervenors,[5] the district court stated, first, that "the adverse effects of affiliation are either not present where the affiliated bank is outside the jurisdiction, or are readily prevented in ways less burdensome than is prescribed in Section 641(b) [§ 281(b)]" (App., *infra*, 59a). Turning to the burdens imposed on interstate commerce by the statute, and relying on this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the district court found that the burden on USAA's interest in operating a Texas bank was "clearly excessive in relation to the local benefits" (App., *infra*, 63a).[6]

The district court distinguished this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), in that "the Maryland statute in *Exxon* did not reach beyond the borders of the state" (App., *infra*, 64a). It simply banned refiners and producers from operating retail stations in Maryland. "In contrast, Section 641 [§ 281], in practical effect, reaches beyond Pennsylvania's borders to interfere with the ownership of a federal savings and loan bank in Texas which was properly ap-

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[5] Those justifications were:

> (1) to protect the insurance industry from, *inter alia*, unfair competition and economic concentration; (2) to protect consumers from coercive "tie-ins" and other forms of subtle pressure tactics by lending institutions; and (3) to protect the ability of the insurance examiners to monitor adequately the insurance industry.

App., *infra*, 59a.

[6] The district court also held that insofar as section 281 may serve a legitimate purpose in regulating affiliations between insurance companies and lending institutions located *within* Pennsylvania where a genuine danger of "tie-in" sales might arise, the statute could be drawn more narrowly to achieve that result. App., *infra*, 63a. The "tie-in" that is of concern under the statute is the conditioning of banking services, especially the granting of credit, on the purchase of insurance from an affiliated company.

proved by and operates under the regulations of the appropriate federal agencies" (App., *infra*, 64a). Accordingly, the district court granted USAA's motion for summary judgment on Commerce Clause grounds and issued a permanent injunction enjoining enforcement of section 281 against USAA.

4. The Commissioner and Intervenors appealed the district court's decision invalidating section 281 on Commerce Clause grounds. The Court of Appeals for the Third Circuit reversed the district court and held that section 281 did not violate the Commerce Clause. App., *infra*, 28a-38a.[7]

The Third Circuit analyzed the Commerce Clause issue by looking to a conception of the relevant burden on interstate commerce that it had recently announced in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987). Under that approach, it did not consider the statute's total burden on interstate commerce, but only "the degree to which the state action incidentally discriminates against interstate commerce *relative to intrastate* commerce. It is a comparative measure" (App., *infra*, 32a, quoting *Norfolk Southern*).

Reading section 281 to apply equally to bar bank/insurance affiliations whether or not the bank is based in Pennsylvania, the court of appeals found that the burden

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[7] Petitioners cross-appealed from the denial of their summary judgment motion based on preemption. *See* note 3, *supra*. The Intervenor agents later appealed a decision from the Eastern District of Pennsylvania, in which the Ford Motor Company and its insurance, banking, and lending affiliates were parties, which held the statute to be preempted in part. The *USAA* and *Ford* cases, although arising separately, were consolidated for purposes of appeal before the Third Circuit. The Third Circuit decision found section 641 to be preempted to the extent, but only to the extent that it interfered with the acquisition of failing thrifts under supervision of the FSLIC, pursuant to 12 U.S.C. § 1730a(m) (1982). App., *infra*, 19a-28a. USAA does not now seek review of that aspect of the decision below.

on interstate insurers was no different from that placed on intrastate insurers—all were barred from affiliating with banks wherever located. Hence the Third Circuit ruled (App., *infra*, 30a) that:

> Because that statute regulated indiscriminately—affording no preference to in-state interests over others—we cannot conclude that it presented a burden to *interstate* commerce and, in that light, we hold that it did not violate the Commerce Clause.

In reaching this result, the Third Circuit noted the concerns of the district court that section 281, in practical effect, would have a significant economic impact, either forcing USAA "to abandon its insurance business in Pennsylvania or relinquish its interest in the Texas bank" (App., *infra*, 35a). The Court stated that it was not "insensitive" to the burden thus created, but noted that the strategy of expanding the corporate base by acquisition of other companies had been of USAA's "own choosing" and "the companies must expect that they will be required to comply with all applicable state as well as federal regulations" (App., *infra*, 36a). In rejecting petitioners' Commerce Clause argument, the Third Circuit relied heavily on *Exxon Corp. v. Maryland, supra.* It viewed that decision as turning not upon the fact that the Maryland statute in *Exxon* "did not regulate beyond the Maryland borders," but rather upon "the *manner* by which the statute regulated" (App., *infra*, 37a-38a). According to the Third Circuit, "[t]he Court [in *Exxon*] concluded that the fact that the statute regulated *indiscriminately* compelled the conclusion that the Commerce Clause had not been violated" (App., *infra*, 38a).

The court below therefore concluded that section 281 did not violate the Commerce Clause.[8] USAA's timely Petition for Rehearing was denied on June 9, 1989.

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[8] The Third Circuit did not question the district court's finding that, where the affiliated bank is outside the jurisdiction, the purposes of the statute were either irrelevant or readily served in ways less burdensome to commerce. *See* App., *infra*, 30a-31a.

REASONS FOR GRANTING THE PETITION

The Third Circuit, in its decision below and in its prior *Norfolk Southern* decision, has adopted a Commerce Clause analysis that is inconsistent with the balancing approach this Court has found applicable to evenhanded, nondiscriminatory statutes. Rather than weighing the burdens on interstate commerce imposed by the statute against the benefits of the local policies it embodies, the Third Circuit approach here looked solely to the nondiscriminatory basis of the statute—"affording no preference to in-state interests over others"—to support its conclusion that the statute imposes no burden on interstate commerce, and thus could not present a violation of the Commerce Clause. App., *infra*, 30a.

The Third Circuit's approach in this case led to approval of a Pennsylvania statute plainly designed to protect Pennsylvania-based independent insurance agents, and having two types of impermissible effects. Enforcement of the statute will have the extraterritorial consequence of causing national insurance companies and perhaps others to forego affiliations with banking, lending, or utility entities located anywhere in the country. As to other companies committed irrevocably to the prohibited affiliations, most of whom will be interstate businesses, the statute effectively bars entry into the Pennsylvania insurance market. Because of these serious consequences of the decision below, and because of the likelihood that it will mislead courts faced with dormant Commerce Clause issues in the future, the decision of the Third Circuit merits the Court's attention.

I. THE THIRD CIRCUIT'S COMMERCE CLAUSE ANALYSIS NULLIFIES THE BALANCING TEST APPLIED BY THIS COURT IN EVALUATING EVENHANDED, NONDISCRIMINATORY STATUTES.

This Court has made clear that statutes may be invalidated under the Commerce Clause both where they directly regulate in a manner discriminatory against

interstate commerce and, under a separate test, where they operate evenhandedly and have only indirect effects on interstate commerce:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (citations omitted). *Accord, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981); *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

In its decision in this case, the Third Circuit declined to engage in the balance of burdens on interstate commerce against local benefits that is appropriate in the instance of evenhanded statutes. Instead it simply concluded (App., *infra*, 38a) from section 281's nondiscriminatory character that the statute could not violate the Commerce Clause:

> To the extent that the regulation infringes upon the commercial association rights of lending institutions outside of Pennsylvania, it infringes upon those same rights of lending institutions within Pennsylvania. In that light, even if § 641 [40 Pa. Stat. Ann. § 281] is viewed as "protectionist" of the economic interests of unaffiliated insurers, because it does not afford that protection only to local agents, it is not violative of the Commerce Clause.[9]

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[9] The court of appeals recognized that "even a statute that is facially indiscriminate may nonetheless be determined to be violative of the Commerce Clause because it has a discriminatory effect"

The Third Circuit reasoned, more specifically, that the court need not consider the statute's total impact on interstate commerce, but only "the degree to which the state action incidentally discriminates against interstate commerce *relative to intrastate* commerce" (App., *infra*, 32a).[10] Because evenhanded statutes by definition do not discriminate against interstate commerce relative to intrastate commerce, the Third Circuit approach truncates the Commerce Clause analysis prior to the balancing process which this Court has mandated. It is therefore directly at odds with decisions of this Court that have viewed as relevant the entire burden on interstate commerce—even where the statutes are not discriminatory on their face or in their application to individual entities.[11]

In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), an Illinois statute restricted the ability to make a tender offer anywhere for shares of an Illinois-affiliated corporation. Intrastate purchases were burdened in the same way

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(App., *infra*, 38a n.19). The court was quite clear, however, that a statute which treats in-state and out-of-state entities the same, both on its face and as it operates in context, cannot violate the Commerce Clause.

[10] In this respect the court relied on the definition of the relevant burden it had first announced in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987).

[11] This Court has recognized that "no clear line" separates state regulation that is per se invalid because it effects a discrimination against interstate commerce, and the category of evenhanded regulation subject to balancing. *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. at 579. "[E]xperience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978). *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 108 S. Ct. 2218, 2220-2221 (1988) (statute could have been struck down as discriminatory, but Court chose instead to balance); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 41 (1980) (statute could have been struck down as per se invalid, but Court chose instead to balance).

as interstate purchases. Yet this Court held that the burden on interstate commerce was too great. *Id.* at 647. *Cf. CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 94 (1987) (in upholding Indiana anti-takeover statute, Court discussed alleged burden on interstate commerce without discussing that burden relative to the burden on intrastate commerce). More generally, the Court has regularly referred simply to the "effects on interstate commerce," rather than to the relative or incremental burden considered by the Third Circuit. *E.g., Pike v. Bruce Church, Inc.*, 397 U.S. at 142; *Edgar*, 457 U.S. at 640 ("the burden the Act imposes on interstate commerce"); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441 (1978) ("the extent of the burden imposed on the course of interstate commerce"); *cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 472-474 (finding no Commerce Clause violation in the case of a nondiscriminatory statute, but only after an extensive analysis of the "burden imposed on interstate commerce").[12]

The courts of appeals have likewise considered the effect on interstate commerce as a whole to be a proper

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[12] In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 108 S. Ct. 2218, 2220 (1988), the Court began its analysis by stating:

> Where the burden of a state regulation falls on interstate commerce, restricting its flow in a manner not applicable to local business and trade, there may be either a discrimination that renders the regulation invalid without more, or cause to weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed is an unreasonable one. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579 (1986).

In so stating, the Court accurately described the situation actually present in *Bendix*, where the challenged provision discriminatorily tolled the statute of limitations as to out-of-state but not in-state corporate defendants. In view of the Court's other decisions, we do not believe that this statement can be read to suggest that Commerce Clause violations can never occur in statutes that are facially evenhanded. Indeed, the *Bendix* Court's citation of *Brown-Forman Distillers*—and to the pages setting out the balancing test—suggests just the opposite.

basis on which to invalidate a state statute. This is especially clear in a number of cases where state statutes have been invalidated even though they applied evenhandedly and in the same manner to interstate and intrastate transactions. In these cases, the courts have looked beyond that evenhanded application—in a way that the Third Circuit did not—to consider the entire impact of the statute on interstate activities. The decisions to strike down these statutes have come notwithstanding and without comparative analysis of substantial, similar burdens on intrastate commerce effected by the same provisions.

In *Dixie Dairy Co. v. City of Chicago*, 538 F.2d 1303 (7th Cir.), *cert. denied*, 429 U.S. 1001 (1976), the court struck down a Chicago ordinance requiring that production facilities for all milk sold in Chicago be inspected by city inspectors, notwithstanding that they had already been subjected to the rigorous inspection and other health standards required under a regime recommended by the United States Public Health Service and adopted in most states. Suit was brought by an Indiana dairy, and the ordinance was invalidated due to the "burden imposed on interstate commerce" by the requirement of duplicative inspections. *Id.* at 1308. The court reached this conclusion notwithstanding that the count of the complaint alleging discrimination against interstate commerce had been dismissed, *id.* at 1307, and that the court could not conclude from the record whether Illinois processors were treated any differently from those based out of state. *Id.* at 1306.

In *Louisiana Dairy Stabilization Board v. Dairy Fresh Corp.*, 631 F.2d 67 (5th Cir. 1980), *summarily aff'd*, 454 U.S. 884 (1981), the court struck down the application of a nondiscriminatory Louisiana licensing, inspection, and fee assessment statute to out-of-state processors of dairy products produced for ultimate consumption within Louisiana, where those processors conducted no activities or transactions within the state. The court en-

gaged in an explicit balance of burdens and benefits and struck down the statute as so applied, notwithstanding its evenhanded application.

In a number of cases involving state anti-takeover statutes, the appellate courts have found Commerce Clause violations, notwithstanding that the statutes imposed precisely the same burdens and restrictions intrastate as on interstate transactions. In *Hyde Park Partners v. Connolly*, 839 F.2d 837 (1st Cir. 1988), for example, the court was presented with a Massachusetts statute requiring, as to corporations organized or having their principal place of business in Massachusetts, disclosure of intent to gain control of a target company before acquiring as much as five percent of the stock. The statute further provided for a delay of one year in pursuing a takeover bid as a penalty for a failure to so disclose. Noting that the statute was "non-discriminatory, because it applies equally to both intrastate and interstate offerors," *id.* at 844, and holding the balancing approach of *Pike* to be applicable, 839 F.2d at 845, the court found the one-year penalty provision to be in probable violation of the Commerce Clause. *Id.* at 847-848.[13] In so doing, the court relied on the statute's "direct and substantial" effect on interstate transactions. *Id.* at 847. It reached this conclusion without any effort to assess the relative burden on interstate as compared with intrastate transactions, notwithstanding its recognition that such local transactions existed and were identically impacted.[14]

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[13] The case arose on appeal of a preliminary injunction against enforcement of the statute. Given the case's posture, it was not appropriate for the court of appeals to render a definitive decision concerning the statute's constitutionality, and it did not do so.

[14] There are two senses in which state anti-takeover statutes may be said to impact on intrastate commerce. First, as to virtually any tender offer, it may be anticipated that many individual intrastate transactions—purchases of stock between offeror and offeree residing in the same state—will be involved. Alternatively, viewing the tender offer as a single transaction, it will sometimes be the case

Similarly, in *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425 (10th Cir. 1983), the court was presented with an Oklahoma statute applicable to companies affiliated with Oklahoma in one of several defined ways, such as being incorporated in Oklahoma, having substantial assets, activities, or its principal place of business there, or having ten percent of any class of equity securities owned by individuals residing there. Under the statute, those making a tender offer for shares of a covered corporation were required to make certain disclosures and afford offerees various other rights. A state official was given the power to pass on the adequacy of disclosures made, and thus to prohibit or at least delay the consummation of such tender offer. *Id.* at 1427. Relying heavily on this Court's decision in *Edgar*, the Tenth Circuit focused especially on the statute's "extraterritorial reach," and struck it down due to its "substantial burden on the interstate trade in securities." *Id.* at 1429. It did so without attention to the fact that intrastate and interstate stock sales were impaired in exactly the same manner, and without any comparative analysis of interstate and intrastate burdens.

Other circuits, evaluating divers provisions of various state anti-takeover statutes, have likewise struck them down on the basis of their burden on interstate commerce, without regard to the comparative burden analysis employed below. *Tyson Foods v. McReynolds*, 865 F.2d 99, 103 (6th Cir. 1989); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 567 (6th Cir. 1982); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1283-1287 (5th Cir. 1978), *rev'd on other grounds*, 443 U.S. 173 (1979).

In sum, the decision below cannot be squared with the Commerce Clause decisions of this Court and of other courts of appeals. Review by this Court is necessary to resolve the conflict in this important area.

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that the offeror and all offerees are located in a single state, so that the entire tender offer is intrastate.

II. PENNSYLVANIA'S INSURANCE ANTI-AFFILIATION STATUTE VIOLATES THE COMMERCE CLAUSE BECAUSE IT HAS THE EXTRATERRITORIAL EFFECT OF FORCING NATIONAL INSURANCE COMPANIES TO REFRAIN FROM CERTAIN AFFILIATIONS ANYWHERE IN THE COUNTRY AND BECAUSE IT DISCOURAGES COMPETITION WITH LOCAL INSURANCE COMPANIES AND AGENTS BY DIVERSIFIED, PREDOMINANTLY INTERSTATE COMPETITORS.

The court of appeals' failure to consider any statutory burdens on interstate commerce not discriminatory on their face or as applied caused it to overlook two fundamental and obvious characteristics of the statute that place it in violation of the Commerce Clause. Specifically, the statute has substantial extraterritorial consequences, and it is protectionist legislation, both in intent and effect.

Most importantly, as the district court found, Pennsylvania's insurance anti-affiliation statute constitutes extraterritorial regulation of interstate commerce. App., *infra*, 64a. The Commissioner's enforcement of the statute has both the purpose and the practical effect of prohibiting affiliations not only within Pennsylvania, where some legitimate local interests might arguably be served by such prohibition, but also in the other forty-nine states. The decision below thus creates an important national problem. Pennsylvania is the fourth largest insurance market in the country, and virtually all large interstate sellers of insurance are licensed and do substantial business there. As a practical matter, many large interstate insurance companies cannot abandon their insurance activities in such a major market as Pennsylvania.[15] The effect of section 281 is therefore to dictate that large interstate sellers of insurance not affiliate with banks

[15] The Third Circuit in *USAA I* acknowledged that a revocation of USAA's license to sell insurance in Pennsylvania would have "devastating economic consequences" for USAA. App., *infra*, 77a.

located in other states, even if those banks, as in USAA's case, have no Pennsylvania operations.

It requires little argument to demonstrate that a statute with these characteristics and effects raises serious questions under the Commerce Clause. The statute's extraterritorial effects are sufficient on their own to invalidate the statute. As this Court has stated, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar*, 457 U.S. at 642-643; *Healy v. Beer Institute*, 109 S. Ct. 2491, 2499 (1989).[16] In *Healy*, as in *Edgar*, the Court held that a state law that has the "practical effect" of regulating commerce occurring wholly outside the state's borders is invalid under the Commerce Clause. 109 S. Ct. at 2499; 457 U.S. at 643.

Like the liquor-related laws at issue in *Brown-Forman Distillers v. New York State Liquor Authority*, *supra*, and *Healy*, the Pennsylvania statute uses the leverage of its state licensing authority to compel actions relating to wholly out-of-state activities. In the liquor cases, permission to sell liquor in the state was contingent on certain affirmations as to prices relative to prices in other states, thus limiting market decisions that could be made in those other states. Here, Pennsylvania is using the powerful leverage of its insurance licensing authority to forbid certain commerce that would occur entirely outside its borders, forcing insurance companies to divest

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[16] In an older case involving the insurance industry, *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926), the Court, in an opinion by Justice Holmes, struck down a state statute making it unlawful for any insurance company authorized to do business within the state to pay a fee to anyone residing outside the state in connection with policies on in-state risks. The Court concluded that the insurance company could not constitutionally "be prevented from employing and paying those whom it needs for its business outside the State." *Id.* at 435.

(or not affiliate with) financial institutions that are located in other states and, like USAA's bank, have no Pennsylvania operations.[17]

The consequences of the Third Circuit's decision will be immediate and substantial. As the record below shows, the Insurance Commissioner has decided that the broad prohibition of section 281 should be read literally and that administrative enforcement actions should be taken in appropriate instances. C.A. App. 164a-165a (*USAA I*). Moreover, when this litigation commenced in 1984, the Commissioner had identified 30 companies in apparent violation, and had determined to conduct further investigation to identify additional potential violations. *Id.* Without a ruling from this Court, the Third Circuit's decision will distort the otherwise growing national trend toward integration of financial services. No state should be permitted to force its views as to the legality of such integration upon the other forty-nine states.

In addition to its extraterritorial regulation, section 281 is a protectionist statute in both intent and effect. By excluding any entities affiliated with a bank, lending institution, or public utility from engaging in the business of selling insurance in Pennsylvania, section 281 was intended to protect the independent insurance agencies operating in the state, some of whom have intervened in support of the law. *Central Mortgage Co. v. Pennsylvania Insurance Dept.*, 100 Pa. Commw. 233, 514 A.2d 956,

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[17] To a significant extent, section 281 thus invades the prerogatives of other states to regulate economic activity and affiliations within their own borders. Some states have made the policy choice to permit the kind of affiliations that section 281 prohibits insurance companies doing business in Pennsylvania from maintaining anywhere. South Dakota law, for example, provides: "Any insurance company, directly or through subsidiaries, may engage in all facets of the banking business . . . ." 58 S.D. Cod. Law Ann. § 27-85 (1989). And the Texas Insurance Department, in the instant case of USAA's proposed bank acquisition, interposed no objection.

958 (1986), *aff'd*, 517 Pa. 64, 534 A.2d 759 (1987). More specifically, it was designed to prevent competition in insurance sales between insurance agents and certain types of financial institutions. App., *infra*, 81a. In part, this was justified by a view that competition would be unfair if it pitted independent agents against larger economic entities. *See* § 281(c); App., *infra*, 59a. Also, the statute was designed to protect against "unfair competition" in the form of tie-ins linking purchases of other products or services to the purchase of insurance. *Id.*

Whether or not it was the specific intention of its draftors, the statute has its primary impact on large, interstate firms. As Acting Deputy Insurance Commissioner Ronald Chronister testified in this matter before the Pennsylvania Insurance Department, it is primarily large companies that have expressed the greatest interest in entering an integrated financial system engaged in both the banking and insurance businesses. Transcript, Pa. Ins. Dept. Docket No. C84-12-5 (November 14, 1985) at 43 ("Transcript"). Indeed, Chronister specifically mentioned various insurance companies and banks, all of which were major interstate entities.[18]

A significant effect of the statute is thus to discourage the sales in Pennsylvania of insurance products by inter-

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[18] Deputy Commissioner Chronister testified, in part, as follows:

> Q. How would you describe the companies, whether insurance or financial institution, that have come to this Department seeking integration: large, small?
>
> A. They have been the large companies, large life insurers such as John Hancock or Prudential, property casualty companies, Allstate. Large insurance companies have been the insurance companies who have expressed the greatest interest in entering an integrated financial system.
>
> From everything I have read, again, it is the large banks such as Citibank and those (sic) which have expressed the greatest interest in the banking side to enter the integrated financial area.

Transcript at 43.

state businesses, and the volume of interstate business thus affected is potentially very large. In addition to USAA, a significant number of interstate companies now doing business in Pennsylvania are subject to exclusion from the state's insurance market by virtue of mixing insurance with banking, lending, or utility activities. The prohibition on affiliation will drive some interstate insurance companies out of Pennsylvania, and will deter entry into the market by others.[19]

The protectionist character of the statute—aimed at protecting a particular economic group against the consequences of competition—adds to the statute's suspect character. As this Court has explained:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.

City of Philadelphia v. New Jersey, 437 U.S. 617, 623-624 (1978).[20] Whatever may be the permissibility of government action protecting one intrastate competitor against another, a different and more serious problem arises when, as here, a significant aim or consequence

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[19] For the foregoing reasons, the court of appeals is wrong in concluding (App., *infra*, 38a n.19) that "[n]othing in the records of the present cases . . . indicates that enforcement of the [Pennsylvania statute] will have the effect of favoring in-state interests over out-of-state interests."

[20] "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, see *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352-353 (1977), or discriminatory effect, see *Philadelphia v. New Jersey, supra*." *Bacchus Imports v. Dias*, 468 U.S. 263, 270 (1984).

of such protectionism is to exclude products originating outside the state.

Because section 281 has the latter economic consequence, the court of appeals' heavy reliance (App., *infra*, 36a-38a) on this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), is misplaced. In *Exxon*, the Court upheld the constitutionality of a Maryland statute that prohibited companies that refined petroleum from owning retail service stations within Maryland. The record in that case revealed that all gasoline ultimately came from out-of-state refiners, so that the exclusion of refiners from the business of retailing affected the particular parties making retail sales, but not the amount of gasoline moving in interstate commerce. *Id.* at 125. Here, unlike in *Exxon*, entities located within Pennsylvania not only sell insurance but "produce" the underlying insurance product.[21] Thus it cannot be said here, as the Court stated in *Exxon*, that any interstate company excluded by the statute will "be promptly replaced by other interstate" companies. 437 U.S. at 127. On the contrary, it may be anticipated that the reduction of competition by large, diversified—and usually interstate—competitors will increase the insurance business of Pennsylvania-based insurers and agents.[22]

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[21] For example, CIGNA, a very large international insurance company operating in a wide range of markets, is incorporated in Pennsylvania and has its principal place of business in Philadelphia.

[22] The statute considered in *Exxon* was different from that presented here in other respects as well. In *Exxon*, Maryland was attempting to deal with market problems resulting during the oil shortage from vertical integration of producers and retailers. Specifically, refiners tended to give preferential treatment to their own retailers, so that the vertical integration was perceived to result in unfair competition in the retail market. Here, the affiliation prohibited is horizontal rather than vertical, and the perceived competitive anomaly resulting from a reliable and exclusive supply of the product, whether in- or out-of-state, is not present. Pennsyl-

In short, unless the decision below is overturned, the Pennsylvania statute will have serious extraterritorial and protectionist consequences. Both the insurance and the banking industries will be directly affected. The economic significance of the case is by itself reason for the Court to grant review.

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vania's concerns deal instead with particular practices—including tying—that it fears may be engaged in by competitors within the State's insurance market if certain affiliations are allowed. The prohibition of affiliations with out-of-state entities, which play no part in insurance competition within Pennsylvania, is thereby largely irrelevant to these concerns. *See* App., *infra*, 59a.

Further, unlike *Exxon*, the practices which are of concern here can be addressed directly, by legislation proscribing unfair credit and insurance practices. There is therefore no justification for barring the underlying affiliation—with the accompanying impairment of interstate commerce—even where affiliations with Pennsylvania entities are involved. In *Exxon*, where the perceived market problem resulted simply from refiners' delivery of gasoline to their own retailers in a time of shortage, there was no identifiable misconduct that Maryland could seek to regulate as a substitute for barring the affiliation entirely.

CONCLUSION

The petition for a writ of certiorari should be granted.[23]

Respectfully submitted,

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September 1989

[23] The Court may wish to consider holding this case for *Lewis v. Continental Bank Corp., prob. juris. noted,* 109 S. Ct. 2446 (1989). That case presents, among other issues, the question whether a Florida statute barring all further state charters for industrial savings banks, which is thus nondiscriminatory on its face, is nonetheless in violation of the Commerce Clause, based on its identifiable purpose and effect of discriminating against interstate entities. The present case similarly involves a statute that is nondiscriminatory on its face, which petitioners argue is nonetheless invalid under the Commerce Clause due in part to its real life protectionist effect against interstate financial entities. Thus it is possible that *Lewis* may shed light on the proper resolution of this case. However, the Third Circuit's decision here presents a conflict in the circuits that is not involved in *Lewis*, and the present statute is substantially objectionable due to its extraterritorial effects, which also are not present in *Lewis*. In addition, *Lewis* presents a substantial mootness question which may well result in none of the common issues even being discussed. Accordingly, we urge the Court to grant the petition rather than to hold it for *Lewis*.

89-449

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Petitioners

v.

CONSTANCE FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 88-1339, 88-5077, 88-5078 and 88-5121

FORD MOTOR COMPANY and FORD MOTOR CREDIT COMPANY, and THE AMERICAN ROAD INSURANCE COMPANY and FORD LIFE INSURANCE COMPANY, and FIRST NATIONWIDE FINANCIAL CORPORATION and FIRST NATIONWIDE BANK

v.

INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA

Appeal of PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER, in 88-1339

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance,

v.

MUIR, WILLIAM J., III, Acting Insurance Commissioner of the Commonwealth of Pennylvania

Appeal of PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER, in 88-5077

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance,

v.

MUIR, WILLIAM J., III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER

Appeal of Constance Foster, in 88-5078

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance,

v.

MUIR, WILLIAM J., III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER

Appeal of United Services Automobile Association,
USAA Casualty Insurance Company,
USAA Life Insurance Company, and
USAA Annuity and Life Insurance Company, in 88-5121

Argued Oct. 5, 1988

Decided May 5, 1989

William R. Balaban, Balaban & Balaban. Harrisburg, Pa., Jonathan B. Sallet (argued), Miller, Cassidy, Larroca & Lewin, Washington, D.C., for appellants PA Assoc. of Ind. Ins. Agents in 88-1339, and 88-5077, and for appellees, PA Assoc. of Ind. Ins. Agents in 88-5121 and 88-5078.

Harvey Bartle, III (argued), Dechert, Price & Rhoads, Philadelphia, Pa., for appellee Ford in 88-1339.

John B. Knoor, III (argued), Chief Deputy Atty. Gen., Office of Atty. Gen., Harrisburg, Pa., for appellee, Constance Foster in 88-5121, 88-5077 and 88-5078.

Christopher K. Walters (argued), Reed, Smith, Shaw & McClay, Philadelphia, Pa., Robert B. Hoffman, Reed, Smith, Shaw & McClay, Harrisburg, Pa., for appellant United Services Auto. Ass'n, in 88-5121, 88-5077 and 88-5078.

Before HIGGINBOTHAM, MANSMANN and GREENBERG, Circuit Judges.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., Circuit Judge.

On these appeals we are revisited by significant questions concerning the appropriate applications of the doctrines of abstention and preemption, and of the dormant commerce clause of the United States Constitution. Although all such cases present issues that require delicate balancing, these cases are particularly sensitive because they concern both a federal scheme designed to assist the nation's failing savings and loans companies and the important state interest in regulating the state insurance

industry. Upon our review of the contentions raised on these appeals, we conclude: (1) that the principles of *Younger* do not require abstention in these cases; (2) that Pennsylvania's statute that precludes companies that sell insurance in Pennsylvania from affiliation with savings and loan institutions is preempted to the extent that the state statute is applicable to companies authorized pursuant to federal legislation to purchase failing thrifts and (3) the state statute is not preempted in its application to other than failing thrifts and, in that application, does not violate the Commerce Clause. In our view, that statute neither discriminates impermissibly in favor of in-state residents, nor presents a burden on interstate commerce and, it therefore, does not present harm precluded by the Commerce Clause. Accordingly, we will affirm the decisions of the district courts in these cases in part and reverse in part.

I. *Background*

These appeals are taken from the judgments of district courts in two declaratory actions that were filed to determine the constitutionality of § 641 of the Insurance Department Act of 1921, as amended, P.L. 1148 (1987), *codified at* 40 Pa.Stat.Ann. (Purdon 1987 Supp.).[1] Although the cases are wholly separate and were filed independently, they were consolidated for the purposes of appeal because of the commonality of the underlying facts and the significant identity of the issues presented for review. The facts of neither case are in dispute. For

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[1] In pertinent part, § 641 provides that

> [n]o lending institution, . . . bank holding company, savings and loan company or any subsidiary or affiliate of the foregoing, or officer or employee thereof, may directly or indirectly, be licensed or admitted as an insurer . . . in this State

40 Pa.Stat.Ann. § 281(b) (Purdon 1987 Supp.). Such institutions may be licensed to "sell credit life, health and accident insurance and to sell and underwrite title insurance in accordance with regulations promulgated by the Insurance Commissioner." *Id.*

the purposes of this discussion, we review the facts and procedural histories of each case briefly:

A. Pennsylvania Ass'n of Independent Insurance Agents v. Ford Motor Co. ("Ford")

In December 1985, Ford Motor Company ("Ford") acquired the First Nationwide Financial Corporation ("FNFC") which is a California based savings and loan holding company. Ford also acquired FNFC's subsidiary, First Nationwide Savings which Ford renamed First Nationwide Bank ("FNB"). At that time, FNB had offices located in California, New York, Florida and Hawaii.

In June 1986 Ford, through its new subsidiaries FNFC and FNB, arranged to purchase two Ohio based savings and loan companies, ("S & L's") that were failing and had been placed into receivership with the Federal Savings and Loan Insurance Corporation ("FSLIC"). FSLIC had solicited applications for the purchase of these S & L's pursuant to federal statutory guidelines designed to limit liability exposure for these failed companies which were federally insured. *See* 12 U.S.C. § 1730a (1982).[2] The

[2] That statute provides for the "[r]egulation of holding companies." In its several sections, it provides explicit guidelines for, *inter alia*, the "registration and examination" of holding companies, *see* § 1730a(b); regulations of "[h]olding company activities," *see* § 1730a(c); "transactions," *see* § 1730a(d) and "acquisitions," *see* § 1730a(e)(1). Significant to the present cases, that statute also provides for "[e]mergency thrift acquisitions." *See* § 1730a(m). In pertinent part, that section provides that:

> [n]otwithstanding any provision of the laws or constitution of any State or any provision of Federal law, except as provided in subsections (c), (e)(2) and (1) of this section, and in clause (iii) of this subparagraph, the Corporation, upon its determination that severe financial conditions exist which threaten the stability of a significant number of insured institutions, or of insured institutions possessing significant financial resources, may authorize, in its discretion and where it determines such authorization would lessen the risk to the Corporation, an insured institution that is eligible for assist-

failing Ohio S & L's were merged with FNB to create a larger national savings and loan entity. Subsequently, in February 1987, Ford requested and was granted permission by the Federal Home Loan Bank Board to open two additional branches of the newly constituted FNB. One of these new branches was in Pennsylvania.

Among the numerous subsidiary companies that are owned and controlled by Ford are the American Road Insurance Company ("American Road"), which is a wholly owned subsidiary of Ford, and the Ford Life Insurance Company ("Ford Life"), which is wholly owned by American Road. Both of these companies are licensed to sell insurance in Pennsylvania and have been engaged in that business for over twenty years. Ford's simultaneous ownership of these insurance companies and FNB, however, placed it in violation of § 641 of the Pennsylvania insurance act.

Accordingly, in June 1987, three months after FNB's Pennsylvania branch office was opened, Ford filed a complaint in the United States district court for declaratory relief from Pennsylvania's enforcement of that statute which, Ford alleged, was unconstitutional on several grounds. Ford claimed, *inter alia* that, to the extent that the statute placed a restriction upon its ownership of a savings and loan institution, it was preempted by 12 U.S.C. § 1730a(m) (1987). Additionally, Ford contended that § 641 was constitutionally infirm because it was violative of the dormant commerce clause of the United

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ance pursuant to section 1729(f) of this title to merge or consolidate with, or to transfer its assets and liabilities to, any other insured institution or any insured bank (as such term "insured bank" is defined in section 1813(h) of this title), may authorize any other insured institution to acquire control of said insured institution, or may authorize any company to acquire control of said insured institution or to acquire the assets or assume the liabilities thereof.

12 U.S.C. § 1730a(m)(1)(A)(i) (1987 Supp.).

States Constitution. The Insurance Commissioner of the State of Pennsylvania ("Insurance Commissioner" or "the Commissioner") filed a reply challenging the merits of the contentions raised by Ford. The Commissioner was joined by the appellants in this case, the Pennsylvania Association of Independent Insurance Agents ("Insurance Agents") who had successfully petitioned the district court for leave to intervene. Together with that motion to intervene, the Insurance Agents also filed a motion to dismiss Ford's complaint in which it petitioned the district court to abstain from adjudication of the complaint pursuant to the *Younger* doctrine of abstention.[3] Prior to intervening in the case, the Insurance Agents had filed a complaint with the Insurance Commissioner initiating an administrative proceeding that sought the revocation of American Road's and Ford Life's insurance licenses because those companies were in violation of § 641. Subsequent to the insurance agents' intervention in this case, Ford filed a motion in the district court seeking an injunction of the state administrative proceedings.

Ford also filed a motion for summary judgment on three grounds: it contended that the statute was unconstitutional as a violation of the equal protection clause, that federal legislation preempted the entire field concerning the acquisition and ownership of savings and loans and that federal legislation that specifically addressed the acquisition of failing savings and loan institutions preempted § 641.

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[3] *See Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). That case represents the starting point for a judicial doctrine "designed to protect the institutional autonomy of state governments by limiting the power of federal courts to grant declaratory or injunctive relief against unconstitutional state action in circumstances where parallel state proceedings involving the federal litigants provide them with an adequate forum for airing their constitutional claims." L. Tribe, *American Constitutional Law* 201-02 (2d ed. 1988).

The district court concluded that neither of the first two contentions raised by Ford for summary judgment were meritorious. It concluded, however, that the language and legislative history of § 1730a(m) evinced Congress's clear intent to preempt state laws that hindered the acquisition of failing S & L's and determined, accordingly, that § 641 had been preempted. Because its decision rested on preemption grounds, the district court also held that abstention was improper. The insurance agents challenge each of the district court's conclusions on this appeal.[4]

B. Foster v. United Services Automobile Ass'n ("USAA")

The United Services Automobile Association ("USAA") is a group of four Texas based insurance companies that are engaged in the insurance business nationwide. It is licensed to sell insurance in Pennsylvania and has been doing so for a number of years. In 1983, USAA was granted permission by the Federal Home Loan Bank Board and FSLIC to create the USAA Federal Savings Bank in Texas. In accordance with all applicable federal regulations, USAA organized and capitalized that bank, which then began doing business in Texas.[5] During the following year, the Pennsylvania Insurance Commissioner notified USAA that its simultaneous ownership of the Texas bank and continued sale of insurance policies in Pennsylvania, violated § 641. It advised USAA that pursuant to § 641, it must either cease the sale of insurance in Pennsylvania or divest itself entirely from ownership

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[4] Ford does not cross-appeal from the decision of the district court concerning the alternate bases on which it sought summary judgment. Accordingly, none of these issues are before us on this appeal. Also, the Insurance Commissioner, although a named defendant, does not join as an appellant in this case.

[5] The record does not indicate—and the insurance commissioner does not contend—that this bank has ever solicited deposits from Pennsylvania citizens, or otherwise done any business in Pennsylvania.

in the Texas bank. USAA filed a omplaint in the district court seeking declaratory relief from enforcement of the statute, which it challenged as unconstitutional on its face and as preempted by federal regulation. Subsequent to that complaint, the insurance department commenced state administrative proceedings for the revocation of USAA's license to sell insurance in Pennsylvania and, in light of those proceedings, filed a motion for dismissal in the district court on abstention grounds. USAA cross-filed a motion for summary judgment on the grounds that § 641 was preempted by § 1730a.

The district court concluded that abstention was appropriate under each of three types of abstention: *Younger*, *Pullman*[6] and *Burford*.[7] We reversed that decision and held that abstention by the district court under any of these theory was improper. *See United Services Automobile Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), *cert. denied, sub nom. Grode v. United Services Automobile Ass'n*, 479 U.S. 1031, 107 S.Ct. 875, 93 L.Ed.2d 830 (1987) (*"USAA I"*). Accordingly, we remanded this matter to the district court for hearing.

On remand, the Insurance Commissioner again petitioned the district court to abstain. The Commissioner limited this request to *Younger* abstention and contended that this Court's decision in *USAA I* had been overruled by intercedent precedent of the Supreme Court in the case *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (*"Dayton Schools"*). The Commissioner argued that *USAA I* had held that *Younger* abstention was inappropriate only because of this Court's view that the State administrative proceedings were an inadequate forum for

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[6] *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

[7] *See Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

the constitutional claims raised. The Commissioner argued that that conclusion was no longer valid in light of *Dayton Schools* and, accordingly, that abstention pursuant to *Younger* was appropriate.

The district court agreed that *USAA I* had been overruled by *Dayton Schools* regarding the issue of *Younger* abstention. It concluded, however, that because of the potential for irreparable harm to USAA, abstention was nonetheless improper. In light of that conclusion, the district court evaluated the merits of the constitutional claims presented. It concluded that USAA's claim that § 641 was preempted by § 1730a was without merit, but determined that § 641 was unconstitutional as a violation of the Commerce Clause.

On this appeal, the Insurance Commissioner and the Insurance Agents challenge the district court's decision not to abstain and its determination that § 641 is unconstitutional. USAA cross-appeals from the decision of the district court that enforcement of § 641 against it is not preempted by the federal regulatory scheme.

II. *Abstention*

Although the analyses of the district courts regarding this issue arise from different circumstances, the threshold concern of both is whether abstention pursuant to *Younger* was warranted. That doctrine of abstention, characterized as one of equitable restraint, instructs us that due deference must be paid to state proceedings initiated to resolve controversies that raise significant state issues when federal court intervention is sought.[8] Defer-

[8] *Younger* abstention precludes intervention by federal courts into on-going state proceedings. The doctrine has been extended, however, to apply to circumstances in which the filing of a federal action *preceded* the initiation of the state proceedings. *See Hicks v. Miranda*, 422 U.S. 332, 349, 95 S.Ct. 2281, 2291, 45 L.Ed.2d 223 (1975) (federal court should abstain in favor of state proceeding initiated subsequent to federal action if no "proceedings of sub-

ence to state proceedings pursuant to *Younger*, however, is not absolute. The appropriate focus of a court's inquiry when the question of *Younger* abstention is raised, therefore, is whether the state proceeding provides an adequate forum for the resolution of the federal claims that have been asserted, *see Dayton Schools*, 477 U.S. at 627, 106 S.Ct. at 2723 (*Younger* principle is applicable to "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim"); [9] and whether deference to the state proceeding will present a significant and immediate potential for irreparable harm to the federal interests asserted. *See Wooley v. Maynard*, 430 U.S. 705, 712, 97 S.Ct. 1428, 1434, 51 L.Ed.2d 752 (1977) (*Younger* abstention improper where federal intervention "necessary in order to afford adequate protection of constitutional rights"); *Kugler v. Helfant*, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 1530-31, 44 L.Ed.2d 15 *reh'g denied*, 421 U.S. 1017, 95 S.Ct. 2425, 44 L.Ed.2d 686 (1975).

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stance on the merits" in the federal action have occurred); *USAA I*, 792 F.2d at 365 ("[s]o long as 'the federal litigation was in an embryonic stage and no contested matter had been decided,' the district court may abstain under *Younger*") (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929, 95 S.Ct. 2561, 2566, 45 L.Ed.2d 648 (1975)). Thus, despite the fact that in both of these cases the federal declaratory action preceded the initiation of the state proceedings, the inquiry into whether *Younger* abstention should apply was proper because no "proceedings of substance on the merits" had yet occurred in the federal courts.

[9] This rule has been extended to include non-judicial state court proceedings that provide a full and fair opportunity for hearing of the federal claims. *See Dayton Schools*, 477 U.S. at 627, n.2, 106 S.Ct. at 2723, n. 2; *Gibson v. Berryhill*, 411 U.S. 564, 576-77, 93 S.Ct. 1689, 1696-97, 36 L.Ed.2d 488 (1973) ("administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings"); *Williams v. Red Bank Bd. of Education*, 662 F.2d 1008 (3d Cir. 1981).

In the present cases, we are persuaded that Pennsylvania maintains the significant interest in the regulation of its insurance industry sufficient to support abstention under this doctrine. In light of the Supreme Court's decision in *Dayton Schools*, we are also persuaded that the scheme for administrative adjudication and judicial review of the claims presented is adequate for *Younger* purposes.

A. Abstention And The Adequacy of State Administrative Proceedings

In *USAA I*, this Court held that "administrative proceedings suffice for *Younger* purposes only when they 'are adequate to vindicate federal claims.'" *USAA I*, 792 F.2d at 365. *See also Williams v. Red Bank Bd. of Education*, 662 F.2d 1008 (3d Cir. 1981). In that light, we concluded that because the Insurance Commission proceeding did not provide a forum for the adjudication of the constitutional claims, abstention was inappropriate. *See Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982) (*Younger* abstention not available where there is no "adequate opportunity [in the state proceedings] to raise the constitutional claims.").

Subsequent to our decision in *USAA I*, the Supreme Court held that state administrative proceedings that do not provide an opportunity for the resolution of the claimant's constitutional contention, are adequate for *Younger* abstention if the state's judicial review of the administrative proceeding provides opportunity for *de novo* hearing of the constitutional claim. *Dayton Schools*, 477 U.S. at 629, 106 S.Ct. at 2724. *Cf. Watts v. Burkhart*, 854 F.2d 839 (6th Cir. 1988) (the fact that the state agency would not consider the constitutional claims raised did not preclude *Younger* abstention where the constitutional claims could be presented on review in the state court); *Christ the King Regional High School v. Calvert*, 815 F.2d 219

(2d Cir.) (same), *cert. denied* —— U.S. ——, 108 S.Ct. 102, 98 L.Ed.2d 63 (1987). Accordingly, we hold now that, to the extent that our decision in *USAA I* concluded that *Younger* abstention is inappropriate in cases where the administrative proceeding itself does not provide a forum for the adjudication of constitutional claims—without regard to the opportunity that exists to pursue those claims on judicial review—it has been overruled by *Dayton Schools.*

In the present cases, this conclusion necessarily results in the determination that the Pennsylvania administrative proceeding in question is sufficient for purposes of *Younger* abstention. The Pennsylvania statutes concerning administrative law and procedure clearly provide for adequate judicial review of state administrative determinations. The statute expressly provides that

> [a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals . . .

2 Pa. Cons.Stat.Ann. § 702 (Purdon 1988). Significantly, the statute provides further that

> [a] party who proceeded before a Commonwealth agency under the terms of a particular statute *shall not be precluded from questioning the validity of the statute in the appeal,* but such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.

2 Pa. Cons.Stat.Ann. § 703(a) (Purdon 1988) (emphasis added). We read these provisions of the Pennsylvania law to permit the assertion of the unconstitutionality of a statute on judicial review of an administrative proceeding in which that statute has been applied and, in light

of *Dayton Schools*, conclude that the administrative proceedings in this case are sufficient for application of *Younger* principles.

Our inquiry into the propriety of *Younger* abstention for the present cases, however, is not terminated here. The district courts in these cases relied on reasons apart from the adequacy of the state proceedings to support their decisions that *Younger* abstention was improper and, on one of these alternate grounds, we affirm their conclusions.

B. Abstention and "Our Federalism"

In *Ford*, the district court's decision not to abstain was predicated upon its view that § 641 had been preempted by federal legislation enacted to provide for the acquisition of failing savings and loans. Relying upon this Court's decision in *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n*, 791 F.2d 1111 (3d Cir. 1986) ("*Kentucky West*"), the district court held that because the supremacy clause was implicated, abstention in favor of the state proceeding was improper. *See Ford Motor Co. v. Insurance Commissioner of Pennsylvania*, 672 F. Supp. 841, 849-50 (E.D.Pa. 1987). The district court stated that "dispositive [of its decision] is a line of cases from the Courts of Appeals for the Third, Eighth, Ninth and Eleventh Circuits that hold that there can be no important state interest that the federal court should defer to in enforcing a state law that has been preempted by federal law." *Id.* at 849.[10]

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[10] We note that an alternative argument against abstention, which is not addressed by the district court, is raised in *Ford* concerning the fact that private individuals—and not the state—initiated the proceedings at issue. This Court has noted that the state's interests in adjudication of a controversy is entitled to less deference in the abstention inquiry where the proceeding was not begun by the state. *See Johnson v. Kelly*, 583 F.2d 1242, 1249 (3d Cir. 1978) (abstention improper in a challenge of tax sales of property when state action to quiet title was brought by private

In this case, as in *Kentucky West*, we note that there is no absolute rule prohibiting the application of *Younger* abstention doctrine whenever the Supremacy Clause is invoked. *See Kentucky West*, 791 F.2d at 1117 ("[i]t would . . . be an overstatement to suggest that *Younger* abstention is never appropriate when the question presented is one of preemption.") The presence of a claim of preemption in such cases, however, requires review of the state interest to be served by abstention, in tandem with the federal interest that is asserted to have usurped the state law. In performing that inquiry, this Court and other appellate courts have "concluded that the notion of 'comity' embodied by the *Younger* doctrine is 'not strained when a federal court cuts off state proceedings that entrench upon the federal domain.'" *Id.* (quoting *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102, 106 S.Ct. 884, 88 L.Ed.2d 919 (1986)). *Cf. Champion Int'l Corp. v. Brown*, 731 F.2d 1406, 1409 (9th Cir. 1984) ("Montana has no cognizable state interest in enforcing those age discrimination laws that are preempted by federal law"). In the present cases, we see no beneficial purpose, as contemplated by the *Younger*

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citizens). This Court has also previously concluded that "where the pending state proceeding is a privately initiated one, the state's interest in that proceeding is not strong enough to merit *Younger* abstention, for it is no greater than its interest in any other litigation that takes place in its courts." *Williams*, 662 F.2d at 1019. These decisions are intended to exclude cases that are initiated for the adjudication of essentially private controversies from the purview of *Younger* abstention. They are distinguishable from the present cases in which the *state's* interest in its proceeding is readily apparent. Despite their initiation by a private complainant, the proceedings at issue necessarily involve the Insurance Commissioner and are conducted by the state commission which enforces the insurance statute. Moreover, as we stated above, we recognize the state's significant interest in the regulation of its insurance industry, and we reiterate our conclusion in *Williams* that "*Younger* commands respect for important state interests, not technicalities of form." *Id.*

doctrine, that would be served by the district court's abstention in favor of Pennsylvania's enforcement of § 641. Although Pennsylvania's interest in the regulation of its insurance industry is significant, there exists a countervailing significant federal interest in insuring the unhindered enforcement of federal law. Balancing these interests in the present cases, we are persuaded that the scales weigh decidedly in favor of federal intervention so that the federal courts could determine the extent to which § 641 had been preempted.

As a preface to our holding on this issue, we note our view that the intent of § 641 is not ambiguous. That section was designed clearly to proscribe affiliations between all state licensed insurance companies and *any* savings and loans institutions. Accordingly, no detailed factual proceedings are necessary to determine the statute's applicability to Pennsylvania licensed insurance companies that purchase savings and loan institutions pursuant to § 1730a. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971) ("[w]here there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim"); *cf. Aluminum Co. of America v. Utilities Comm'n of North Carolina*, 713 F.2d 1024, 1030 (4th Cir. 1983) (abstention is inappropriate where conflict between challenged state action and federal law is "readily discernible from the pleadings") *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984). Moreover, on the records of these cases, we can discern no construction of the state statute that would limit its application such that review of the federal constitutional claims would be unnecessary.[11] In cases in-

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[11] USAA reasserts on this appeal its contention that it is not subject to the prohibitions of § 641, even if the constitutionality of that statute is upheld, because it's banking affiliate "neither accepts deposits nor lends money *in Pennsylvania* and[,] therefore[,] is not a 'lending institution' within the meaning of the statute." Appellee/Cross-Appellant (USAA) Brief at 19 (emphasis in orig-

volving a facial challenge to a statute, the pivotal question in determining whether abstention is appropriate is whether the statute is 'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question.' " *City of Houston, Texas v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 2513, 96 L.Ed.2d 398 (1987) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534-35, 85 S.Ct. 1177, 1181-82, 14 L.Ed.2d 50 (1965)) (other citations omitted). When the possibility for such an interpretation is not apparent, however, the district court's decision to exercise its jurisdiction does not constitute error. Moreover, where the core of the controversy itself is the federal constitutional claims, and the state proceedings are initiated for *enforcement* rather than *interpretation* of the state statute, we do not conclude that the exercise of federal jurisdiction is intrusive.

In our view, the principles of comity and federalism upon which the *Younger* doctrine is predicated, are not undermined by federal intervention in these cases, which would forestall the state proceedings in order to determine whether enforcement of the state statute conflicts with an important federal scheme. *Cf. Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 1526, 95 L.Ed.2d 1 (1987) (*Younger* abstention warranted when "civil proceedings are pending, *if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.*") (emphasis added). Federal intervention in these cases does not intrude upon

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inal). The district court's decision on remand from *USAA I* does not address this contention and, on this record, it is not apparent that the appellee continued to pursue this claim in the district court. We cannot conclude that the issue, which requires factual inquiry as well as the interpretation and application of Pennsylvania state law, is properly before us. Accordingly, we do not reach this issue. We will remand this question to the district court, however, to determine the viability of this claim and, if viable, for initial decision on the merits.

the principles of our federalism given the nature of the state proceedings at issue and the significance of the federal claims asserted. Accordingly, we conclude in both of the present cases, that the challenge to § 641 on the grounds that is preempted, together with the significant federal interest that is implicated, counsel in favor of the district courts' decisions not to abstain.[12] We will, therefore, affirm the decisions of the district courts not to abstain.[13]

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[12] Our conclusion that *Younger* abstention was not warranted in these circumstances applies to each case, despite our holding, that the preemption claim prevails only with regard to one of the transactions in one of the cases. *See infra*, § III. Our holding regarding *Younger* is predicated upon the significance of the federal interest invoked in these cases and our determination that the principles of comity and federalism are not undermined by the intervention of the federal court into the state proceedings in these cases. The determination of whether abstention is proper where preemption is alleged does not rest upon whether the preemption claim will ultimately prevail. Accordingly, just as the presence of a claim of preemption will not preclude abstention in every case, the decision that abstention is improper in light of a claim of preemption that has been asserted, need not result in the finding that the state statute has in fact been preempted.

[13] Although we have concluded that the district court's decision not to abstain in *USAA* was appropriate, we are compelled to address the rationale upon which the district court relied. On remand from our decision in *USAA I* the district court recognized that *Dayton Schools* overruled our decision with regard to the adequacy of the Pennsylvania proceedings, *see USAA v. Foster*, 680 F.Supp. 712, 175 (M.D.Pa. 1987). The district court declined to abstain, however, based on its interpretation of this Court's decision in *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3d Cir.) *cert. denied*, —— U.S. ——, 108 S.Ct. 148, 98 L.Ed.2d 104 (1987). The district court determined that in *Sullivan* this Court added a separate "irreparable harm" factor to the inquiry of when *Younger* abstention is proper. Accordingly, the district court concluded that prior to invoking *Younger* abstention it had to ascertain whether abstention would result in irreparable harm to USAA and, on that point, the district court held that it was bound by the decision of

III. *Preemption*

Both Ford and USAA contend that § 641 has been completely displaced by federal legislation and is there-

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this Court in *USAA I* concerning the affect that abstention would have upon USAA. It held that "[i]n [*USAA I*], the Third Circuit decided that USAA would suffer irreparable harm if we were to abstain." *USAA*, 680 F.Supp. at 715.

The district court's interpretation of *Sullivan* was in error. *Sullivan* did not create a new criterion to be evaluated in the *Younger* analysis, but rather interpreted—in light of the specific circumstances of the case under review—a factor that has always been an appropriate part of that inquiry. In *Younger* and in its companion cases, the Supreme Court affirmed a long standing judicial policy that deference to a state action is improper where "extraordinary circumstances [exist] in which . . . irreparable injury" to the litigant's ability to vindicate the constitutional claim is demonstrated. *Younger*, 401 U.S. at 55, 91 S.Ct. at 755. *See also, Samuels v. Mackell*, 401 U.S. 66, 69, 91 S.Ct. 764, 766, 27 L.Ed.2d 688 (1971) ("In the *Younger* case, we set out in detail the historical and practical basis for the settled doctrine of equity that a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."). In *Sullivan*, we noted that "the nature of the term 'irreparable harm' makes it difficult to define every situation the term encompasses". *Sullivan*, 811 F.2d at 178 (citing *Trainor v. Hernandez*, 431 U.S. 434, 442 n. 7, 97 S.Ct. 1911, 1917 n. 7, 52 L.Ed.2d 486 (1977)). We also noted the Supreme Court's instruction that "circumstances are extraordinary in the relevant *Younger* sense where they create 'an extraordinary pressing need for immediate federal equitable relief" *Sullivan*, 811 F.2d at 179 (quoting *Kugler*, 421 U.S. at 124-25, 95 S.Ct. at 1530-31). *See also Wooley*, 430 U.S. at 712, 97 S.Ct. at 1434 (extraordinary circumstances, in terms of *Younger*, exist where " 'an injunction is necessary in order to afford adequate protection of constitutional rights.' ") (quoting *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322 (1935)). We reiterate here that this exception is intended to be applied with careful scrutiny and only to the extraordinary case.

In *Sullivan*, we concluded that extraordinary circumstances were present that warranted immediate federal court intervention. That case concerned recovering alcoholics who sought declaratory and injunctive relief—predicated upon claims of constitutional depriva-

fore invalid under the Supremacy Clause of the Constitution. *See* U.S. Const. art VI, cl. 2.[14] They argue that Congress has preempted the field of regulation regarding savings and loan institutions and, thus, that § 641 has been superceded by the federal scheme. To the extent that § 641 applies to the acquisition of failing thrifts we are convinced that it has been preempted by federal law. We are unpersuaded, however, as were the district courts,

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tion—from the city of Pittsburgh's decision to close alcoholic treatment centers. The district court had made a factual finding that "if recovering alcoholics at the Center were improperly forced from the center and into a community which cannot provide treatment for their abuse, these alcoholics" might suffer severe injury or death as a result. *Sullivan*, 811 F.2d at 180. We determined that this factual finding was not in error and held that "the threat of this type of injury is precisely what the irreparable harm exception to *Younger* is intended to prevent." *Id.* Specifically, we noted that

> [a] wrongful deprivation by the City of Pittsburgh in this case would threaten not only to do harm to appellees' present enjoyment of rights to Equal Protection, Due Process and equal treatment under the Rehabilitation Act of 1973, *but to eliminate the possibility of appellees' enjoyment or exercise of any federal constitutional or statutory rights in the future.*

Id. (emphasis added). In the present cases, on the records before us, we cannot say with certainty that the same potential for irreparable injury to the appellees' right to vindicate their federal claims exist, and thus that "extraordinary circumstances" are present that compel immediate federal intervention. Accordingly, we will not affirm the district court's rationale in *USAA* that irreparable harm mandated disregard for *Younger*. In light of our holding that abstention was nonetheless proper, however, we will uphold the district court's judgment.

[14] In pertinent part, that provision states that the "Constitution, and the Laws of the United States which shall be made in Pursuant thereof . . . shall be the supreme Law of the Land . . ." U.S. Const. Art. VI cl. 2. *See also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824) ("to such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the law of Congress, made in pursuance of the constitution, . . . [i]n every such case, the act of Congress . . . is supreme; and the law of the State . . . must yield to it.")

that Congress intended to preempt entirely the states' authority to impose regulations upon savings and loan institutions that operate within the state's borders, or, as in the present case, to impose regulations upon other financial institutions that seek affiliations with savings and loans.

In reaching this conclusion, we are guided by the Supreme Court's instruction that preemption analysis should be "tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch v. Ware*, 414 U.S. 117, 127, 94 S.Ct. 383, 389, 38 L.Ed.2d 348 (1973). *Cf. Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 *reh. denied*, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963) ("federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained"). In light of this presumption in favor of the validity of state regulation, and because there is no clear indication that federal legislation is intended exclusively to provide for every aspect of the regulation of savings and loan institutions, we conclude that, apart from its application to savings and loan companies acquired pursuant to § 1730a(m), § 641's proscription of affiliations between insurance companies and savings and loan institutions has not been preempted.

A. Section 641 is Pre-empted Regarding the Acquisition of Failing Thrifts

"The question [of] whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme." *Hillsborough County v. Auto-*

mated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947); *California Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987) ("[i]n determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress.") Significantly, we note that Congress may decide not to displace state law entirely and, consequently, "may . . . preempt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible." *Michigan Canners & Freezers Ass'n., Inc. v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984) (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. at 142-43, 83 S.Ct. at 1217-18). A conflict arises also where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941); *see also Hillsborough County*, 471 U.S. at 713, 105 S.Ct. at 2375.

In the present cases, we have no difficulty discerning Congress' intent from the language and legislative history of § 1730a(m) which, in our view, clearly provides that § 641 is preempted to the extent that it applies to Ford's acquisition of failing savings and loans.

In pertinent part, § 1730a(m) provides that "[n]otwithstanding any provisions of the laws or constitutions of any State or any provision of Federal law . . . [FSLIC] upon its determination that severe financial conditions exist which threaten the stability of a significant number of insured institutions . . . may authorize *any company* to acquire control of said insured institution." 12 U.S.C.

§ 1730a(m) (Supp. 1987) (emphasis added). This language amply demonstrates Congress' intent to preempt *all* other legislation that might inhibit the purchase of a failing thrift by a FSLIC approved buyer. Although that language, by itself, is sufficient to support our conclusion, Congress has left an even more explicit statement of its intent. In the conference report on the reenactment of 1730a(m), Congress expressly noted that with regard to the circumstances presented by one of these cases

> [e]xcept as [limited by other sections of the federal statute] section 408(m)(A)(i) preempts other provisions of Federal and State law that would have the effect of preventing a company from acquiring a failing thrift institution. *Thus, for example if a life insurance company invested in or acquired a thrift institution under section 408(m) [enacted and codified as 1730a(m)], that section would preempt any state law that would prevent the company from continuing to engage in the life insurance business because of that investment or acquisition . . .*

H.R.Rep. No. 261, 100th Cong., 1st Sess., Cong.Rec. H 6857, H 6895 (daily ed. July 31, 1987) (emphasis added), U.S. Code Cong. & Admin. News 1987, p. 489. This legislative history provides unmistakable guidance to us for the disposition of this issue. *See United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 134, 98 S.Ct. 965, 980, 55 L.Ed.2d 148 (1978) ("the legislative background of [a] reenactment is conclusive . . . [w]hen a Congress that reenacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation and this Court is bound thereby"). We hold that Congress's intent to preclude any impediment to the acquisition of failing thrifts is clear. In the present cases, therefore, we conclude that § 641 is preempted with regard to Ford's purchase of the Ohio thrifts *and* the authorized branch offices of those thrifts opened in Colorado and Pennsylvania.

We reach the latter part of this holding in light of the factual finding by the district court that an essential aspect of Ford's agreement with FSLIC to purchase the Ohio thrifts was the authorization that Ford received to open the branch offices of the thrift. *Ford*, 672 F.Supp. at 843. Specifically, the district court found that, "under the authority of 12 U.S.C. § 1730a(m), the Bank Board granted to FNB the right to open branches in Pennsylvania and [Colorado]." *Id.* The district court took note of the Bank Board finding that

> "the Acquisition and Merger [of FNB and the Ohio thrifts] are of very substantial benefit to the FSLIC in a measure sufficient *to constitute a compelling factor in determining to make an award of branching rights in Pennsylvania and Colorado to [FNB]*"

Id. (quoting Bank Board resolution approving acquisition of Ohio thrifts) (emphasis added). The district court concluded that "FNB would not have acquired the Ohio savings and loan associations if it did not get the right to open branches in these two states in return." *Id.* We do not find that determination to be clearly erroneous. We are compelled by it, and the rationale underlying § 1730a(m), to preclude application of § 641 to the Pennsylvania or Colorado branches of the thrift. In our view, application of § 641 to these branches would frustrate the intent of the federal legislation just as would the application of the state statute directly to the purchase of the Ohio thrifts themselves. Accordingly, § 641 is preempted as to these authorized branches as well as the Ohio thrifts and enforcement by Pennsylvania of § 641 as to Ford's ownership of these thrifts is precluded.

We do not reach a similar conclusion concerning thrifts acquired or capitalized outside of the purview of § 1730 a(m). The legislative intent to preempt the application of § 641 beyond cases involving the acquisition of failing

thrifts is not evident, and accordingly, as to those cases, § 641 has not been preempted.

B. Federal Regulations That Concern The Savings and Loan Industry, Although Comprehensive, Do Not Evidence Congress's Intent to Displace State Regulation Entirely and Did Not Pre-empt § 641

In these cases, USAA and Ford argue that the regulatory scheme that Congress enacted for the savings and loan industry was intended to occupy that field exclusively. They contend that the federal scheme was intended to regulate more than just the *operations* of savings and loan institutions, but also to regulate every aspect "regarding the organization, ownership, incorporation and operation of federal savings banks." Appellee (*USAA*) Brief at 21. *See also*, Appellee (*Ford*) Brief at 24 ("[section] 641 is preempted as applied . . . because it frustrates federal purposes and 'stands as an obstacle' to the broad and pervasive federal regulatory scheme governing the ownership and control of federal S & L's"). They assert that the comprehensiveness of the federal regulatory scheme, together with the significant federal interest in the regulation of savings and loan institutions, evinces congressional intent to preclude supplemental state regulation. We do not agree.

In cases such as these, where Congress has not expressly preempted a state's statute, its "intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough County*, 471 U.S. at 714, 105 S.Ct. at 2375. *See also Guerra*, 479 U.S. at 280, 107 S.Ct. at 689 (congressional intent to preempt may be inferred where the scheme of federal regulation is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementaly state regulation").

In both cases, the district courts acknowledged the comprehensiveness of the federal regulatory scheme. *See USAA*, 680 F.Supp. at 716; *Ford*, 672 F.Supp. at 846. Both district courts, however, concluded that the intent of the federal scheme was to regulate the *operation* of federally insured thrifts. Accordingly, each court concluded that the federal regulations did not preclude supplemental state regulations which, as in these cases, imposed a restriction upon the *affiliations* that the thrift could have and were designed more to regulate the insurance industry rather than to control the operation of the savings and loan industry. Our review of the federal regulatory scheme leads us to a similar conclusion.

We reiterate that our conclusion on this issue is informed by the Supreme Court's instruction that "federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. at 142, 83 S.Ct. at 1217. We are unconvinced that the federal banking regulatory scheme permits no conclusion other than that Congress intended to occupy the field exclusively.

Initially we note that the comprehensive nature of the federal regulatory scheme, by itself, is not sufficient to support a conclusion that Congress intended to preempt all state regulation. *See Hillsborough*, 471 U.S. at 717, 105 S.Ct. at 2377 ("[t]o infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive"). Indeed, precisely because the regulatory scheme at issue in these cases is so detailed, we interpret the absence of clear preemptive language as indicative that Congress did not intend to displace state law entirely. We note, as has the Supreme Court, that "be-

cause agencies normally address problems in a detailed manner and can speak through a variety of means . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Id.*

Moreover, the regulations at issue in the present cases provide explicitly for preemption of state law on two issues, *see* 12 C.F.R. § 590 (1988) ("Preemption of State Lending Restrictions) (expressly preempting state usury laws and state due on sale laws), but no where indicate that *all* state regulation is preempted. Indeed, in one section, the regulations clearly demonstrate Congress' recognition that the federal scheme might be supplemental by state regulation. Section 555.17(b) precludes officers or directors of savings and loan associations from referring insurance business generated by members of the S & L to insurance companies with which the officers or directors are affiliated.[15] Such referrals would constitute a usurpation of the S & L's corporate opportunity to engage in the insurance business. Significantly, however, § 555.17 is limited by specific exceptions enumerated elsewhere in the section. One of those exceptions provides that

> [n]o corporate opportunity for a Federal association to enter the insurance business is deemed to have existed
>
> . . . .
>
> [w]*hile a specific State statute or regulation precluded Federal association service corporations . . . from engaging in the insurance business*

12 C.F.R. § 555.17(c)(iii) (1988) (emphasis added).

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[15] In pertinent part, that section provides that

> referral of insurance business of an association's members to an insurance agency owned by one or more officers or directors of the association, or by one or more persons having the power to direct its management, constitutes usurpation of the association's corporate opportunity to engage in the insurance business.

12 C.F.R. § 555.17(b) (1988)

Appellees correctly assert that the circumstance provided for in § 555.17 is not at issue in these cases. In our view, however, the existence of this provision provides compelling evidence that Congress did not envision that all state regulations would be in conflict with the federal regulatory scheme. Moreover, the subject matter of § 555.17(c)(iii) is particularly significant because it demonstrates Congress's specific awareness of the existence of state statutes such as § 641. In that light, we cannot conclude that, by these regulations, "Congress 'left no room' for supplementary state regulation." *Hillsborough County*, 471 U.S. at 713, 105 S.Ct. at 2373. Accordingly, we also cannot conclude that Congress intended exclusively to occupy this field of regulation.

IV. *Dormant Commerce Clause*

Upon their conclusions that abstention was not warranted and that § 641 was not wholly preempted, the district courts reviewed Ford's and USAA's claim that § 641 was invalid as a violation of the dormant Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3.[16] On that

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[16] In pertinent part, that clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several states." U.S. Const. art. 1 § 8, cl. 3.

In light of its conclusion that USAA's creation of a Bank in Texas was not preempted by federal law because it did not fall within the scope of 1730a(m), the district court granted summary judgment to USAA on the grounds that enforcement of § 641 against that insurer violated the Commerce Clause.

In *Ford*, the district court initially did not reach the merits of this constitutional issue. It's decision held only that federal law preempted application of § 641 to the acquisition of the failing Ohio S & L's and the Pennsylvania and Colorado branches. Subsequent to that decision, the Commissioner moved for amendment of the district court's order because it did not address Ford's acquisition of FNFC and FNB in 1985, which the commissioner asserted was a violation of § 641. The Commissioner contended that application of § 641 was not preempted because those institutions had not been purchased pursuant to the failed S & L provi-

claim, however, the courts concluded that to the extent that § 641 was not preempted, it was nonetheless constitutionally infirm because it imposed an excessive burden upon interstate commerce.

The courts determined that § 641's proscription of affiliations between Pennsylvania insurance companies and financial institutions—whether or not located in Pennsylvania—indirectly regulated interstate commerce. Accordingly, the district courts held that resolution of the constitutional validity of § 641 turned upon application of the Supreme Court's holding in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). In *Pike*, the Supreme Court stated that

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sion of federal law. In response to that motion the district court concluded that, although § 1730a did not preempt the application of § 641 to FNFC and FNB, "enforcement of section 641 on insurance companies that own banking affiliates that do not operate in Pennsylvania is invalid as a violation of the commerce clause of the Constitution." *Ford Motor Co. v. Insurance Commissioner*, No. 87-3241 (Supplemental Memorandum) slip op. at 5, 1988 WL 29342 (E.D.Pa. Mar. 22, 1988) *reprinted at* Jt.App. at 148. (citing *USAA*). In reaching its conclusion, the district court relied entirely upon the rationale expressed in *USAA v. Foster*. Accordingly, our discussion of the propriety of application of the Commerce Clause to § 641 focuses upon the decision issued in *USAA* and attributes that holding to both cases. We note, however, that the decision of the district court in *USAA* striking § 641 as violative of the Commerce Clause, relied in significant part upon the fact that the insurer in that case *did not own an affiliated bank that transacted business in Pennsylvania. See USAA*, 680 F.Supp. at 722. That circumstance, obviously, is not true in *Ford*. The decision in *USAA, in dicta*, did note that in cases that involved insurers who were affiliated with Pennsylvania banks "the concerns of the Commissioner and the [Independent Agents] become very real," *Id.* at 721-22, but summarily concluded that that statute would nonetheless be invalid as overbroad. In our view, that conclusion is insufficient of itself to support the judgment in *Ford*. For that reason, even if we were to sustain the decision of the district court in *USAA*, we could not, on this record, affirm the judgment of the district court in *Ford*.

> [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are not incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits

Id. at 142, 90 S.Ct. at 847.

In the present cases, the district courts concluded in light of *Pike* that, although the imposition on interstate commerce that resulted from the enforcement of § 641 is incidental, that burden is still "excessive" because the benefits to Pennsylvania are not sufficiently realized by § 641 to support the burden upon interstate commerce. For that reason, the district court struck § 641 as unconstitutional. In arriving at this balance between the significance of the state interest in precluding the affiliations between insurers and banking institutions, and the effect of that regulation upon interstate commerce, however, the district courts erred. Because that statute regulated indiscriminately—affording no preference to in-state interests over others—we cannot conclude that it presented a burden to *interstate* commerce and, in that light, we hold that it did not violate the Commerce Clause.

Indiscriminate Regulation Of Commerce Does Not Necessarily Burden "Interstate Commerce"

The Insurance Commissioner asserts that § 641 effects three important state goals: "to protect the insurance industry from . . . unfair concentration; . . . to protect consumers from coercive 'tie-ins' and other forms of subtle pressure tactics by lending institutions; and . . . to protect the ability of the insurance examiners to monitor adequately the insurance industry." *USAA*, 680 F. Supp. at 720. The district courts did not question the legitimacy of these goals, but concluded that "the adverse effects of affiliation are not present where the affiliated

bank is outside the jurisdiction, or are readily prevented in ways less burdensome than is prescribed in Section 641(b)." *Id.*

Resolution of the issue of applicability of the Commerce Clause to these cases is dependent upon the level of scrutiny that is applied to review the Pennsylvania statute. As we have previously noted, three standards of review are applied in performing dormant Commerce Clause inquiry:

> 1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny; 2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and 3) the remaining cases are governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits.

Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 398-99 (3d Cir. 1987). Under the highest level of scrutiny "the burden falls upon the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2448, 91 L.Ed.2d 110 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979)). "In practice, such heightened scrutiny is applied with considerable rigor and turns out to be 'a virtually *per se* rule of invalidity.'" *Norfolk Southern Corp.*, 822 F.2d at 400 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978)).

In the present cases, heightened scrutiny of § 641 is not warranted because that provision does not discriminate in the manner that it regulates. As we have held

"[h]eightened scrutiny is the standard of review for 'simple economic protectionism.' . . . [this] category of protectionism includes those state measures that discriminate on their face against out-of-state interests or in favor of in-state interests." *Norfolk*, 822 F.2d at 400 (citing *Philadelphia*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *Hughes*; *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984)). The state statute at issue, however, is not the "simple economic protectionism" that the Commerce Clause precludes. Accordingly, because heightened scrutiny is not applicable, § 641 must be upheld if the incidental burden that it imposes upon interstate commerce is not "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. *See also, Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456, 471, 101 S.Ct. 715, 727, 66 L.Ed.2d 659 *reh. denied*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981).[17]

As we have previously noted in performing that inquiry, "[t]he 'incidental burden on interstate commerce' appropriately considered in Commerce Clause balancing is the degree to which the state action incidentally discriminates against interstate commerce *relative to intrastate* commerce. It is a comparative measure." *Norfolk Southern*, 822 F.2d at 406 (emphasis added). In our view, "the Commerce Clause is concerned with protectionism and the need for uniformity . . . legislation will not be invalidated under the *Pike* test in the absence of *discriminatory* burdens on interstate commerce." *Id.*

The Supreme Court's decision in *Exxon Corp v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d

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[17] We do not reach the inquiry of whether § 641 is entitled to the second standard of review set forth in *Norfolk Southern*. Although Pennsylvania has a significant interest in the regulation of its insurance industry, its concern is not "pecularily local" such that it invokes this most differential standard of review.

91, *reh. denied sub nom., Shell Oil Co. v. Governor of Maryland*, 439 U.S. 884, 99 S.Ct. 232, 58 L.Ed.2d 200 (1978), provides useful instruction. In *Exxon*, the Court addressed a Maryland statute that precluded companies that refined petroleum from owning retail service stations within Maryland. The proscription applied to in-state owners of oil refineries as well as to out of state refineries, and because no competitive advantage to local interest was discernible, the court upheld the constitutionality of the statute. In reaching its conclusion, the Court noted that the state act "create[d] no barriers whatsoever against interstate independent dealers; it [did] not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Exxon*, 437 U.S. at 126, 98 S.Ct. at 2214. The Court concluded that "the absence of any of these factors *fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce.*" *Id.* (emphasis added). It held that

> [w]hile the refiners will no longer enjoy their same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. *The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.*

437 U.S. at 126, 98 S.Ct. at 2214 (emphasis added). *See also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88, 107 S.Ct. 1637, 1649, 95 L.Ed.2d 67 (1987) ("[b]ecause nothing in the Indiana Act imposes a greater burden on out-of-state [entities] than it does on similarly situated Indiana [entities], we rejected the contention that the Act discriminates against interstate commerce").

This Court has similarly concluded that

> [w]here the "burden" on out-of-state interests is no different from that placed on competing in-state in-

> terests . . . it is a burden on *commerce* rather than a burden on *interstate commerce*. In such cases, nothing in Commerce Clause jurisprudence entitles out-of-state interests to more strict judicial review than that to which the in-state interests are entitled.

Norfolk Southern, 822 F.2d at 406 (emphasis in original). We are persuaded that this same conclusion is applicable to the present cases. Section 641 places no discriminatory burdens on interstate insurers. It does not add increased costs to them or otherwise distinguish between in-state insurers and out-of-state insurers in the insurance market. Indeed, as the district court in *USAA* found, USAA "could not make . . . [the] argument [that § 641 discriminates against interstate commerce in favor of local business because] Section 641(b) treats all insurance companies and all savings and loans alike, *whether or not they are based in Pennsylvania.*" *See USAA*, 680 F.Supp. at 719 n. 6. For these reasons, we conclude that the Commerce Clause has not been violated.[18]

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[18] Our holding in these cases is consonant with the Supreme Court's guidance in this area. The Court has previously noted that where regulations "affect alike shippers in interstate and intrastate commerce in large numbers within as well as without[,] the state is a safeguard against their abuse." *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 187, 58 S.Ct. 510, 515, 82 L.Ed. 734 (1938). That holding endorses the rationale that the state's regulatory scheme will be adequately monitored because an instate constituency is similarly affected, and will act in its interests to keep the legislature from overreaching. *See also, Southern Pacific Co. v. Arizona*, 325 U.S. 761, 783, 65 S.Ct. 1515, 1527, 89 L.Ed. 1915 (1945); L. Tribe, *American Constitutional Law* at 409-10 & nn. 4-8 (2d ed. 1988).

One possible source of this rationale is the famous "footnote 4" of *Carolene Products*. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938). Consistent with the overall view of that case, the court articulated a view that one commentator has described in the following manner:

> [w]hen states adopt economic regulations that affect out-of-state interests, those out-of-state interests are likely to be short-

The district courts, in reaching the conclusions that the Commerce Clause invalidates § 641, appear to have been most persuaded by the significant economic effect that enforcement of § 641 will have upon Ford and USAA. Indeed, the district court in *USAA* concluded that "[i]f the Insurance Department enforces Section 641(b) against USAA, USAA will be forced to abandon its insurance business in Pennsylvania or relinquish its interest in the Texas bank. If USAA opts to allow its insurance license to be revoked, this revocation could re-

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changed because they are not represented in the political process that produces the regulations. But everyone who is affected ought to be represented. Therefore we have judicial review of state economic regulation that affects out-of-state interests in order to give those interests "virtual representation."

Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich.L.Rev. 1091, 1160 (1986). The value of this analytical approach is debated. *Compare id.* (asserting that implicit in such an approach is the reliance upon state and federal interests, and arguing that such an approach should be replaced by inquiry of the state legislature's motivation) *with* Tushnet, *Rethinking the Dormant Commerce Clause*, 79 Wis. L.Rev. 125 (1979) (discussing a political theory of judicial review in dormant commerce clause cases in which the focus of concern is the adequacy of the legislature to protect important interests). This rationale however, is firmly entrenched in our jurisprudence, *see, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n. 17, 101 S.Ct. 715, 728 n. 17, 66 L.Ed.2d 659 *reh. denied*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981) ("[t]he existence of major in-state interests adversely affected by the [state statute] is a powerful safeguard against legislative abuse); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n. 18, 98 S.Ct. 787, 795 n.18, 54 L.Ed.2d 664 (1978) ("The Court's special deference to state highway regulations derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other states' economic interests, thus insuring that a state's own political processes will serve as a check against unduly burdensome regulations"), and persuades us in the present cases, that the protections afforded by the Commerce Clause are not implicated.

sult in devastating economic consequences." *USAA*, 680 F.Supp. at 721. On this point, the district court quoted this Court's opinion in *USAA I* in which we concluded, in our holding that *Pullman* abstention was inappropriate, that USAA would suffer "devastating economic consequences" if its license to sell insurance in Pennsylvania was revoked. *See id.* (quoting *USAA I*, 792 F.2d at 363).

We are not unaware, nor are we insensitive to this "burden" that results from the enforcement of the state provision. We cannot say, however, that the dormant Commerce Clause is the proper remedy. Both Ford and USAA appear to have adopted corporate strategies that seek to expand their corporate bases by the acquisition of other companies. That strategy is their own choosing and we express no value judgments concerning it. In making those choices, however, the companies must expect that they will be required to comply with all applicable state as well as federal regulations. They cannot hope to invoke the Constitution at every turn to circumvent state regulation and insure unrestricted expansion and protection of their opportunity to obtain the greatest margin of profit.

On this point we are again guided by *Exxon*. In that case, the Supreme Court noted arguments that, as the result of the state divestiture regulation, some oil refiners would stop selling in Maryland. *See Exxon*, 437 U.S. at 127, 98 S.Ct. at 2215. The Court also recognized that the result of that occurrence might be that Maryland consumers would be deprived of some special services that had previously been provided by the affiliated retail stations. *Id.* Although it assumed, *arguendo*, the accuracy of these contentions, the Court nonetheless concluded that the protections of the Commerce Clause, had not been triggered. Significantly, it concluded that even if those refiners chose to withdraw entirely from the Maryland market "there [was] no reason to assume that their share of the entire supply [would] not be promptly replaced by

other *interstate* refiners . . interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Exxon*, 437 U.S. at 127, 98 S.Ct. at 2215. Similarly, in the present cases, the district courts, holdings give us no reason to conclude that *interstate commerce* will be adversely affected by enforcement of § 641. There is no reason for us to assume that USAA's or Ford's share of the insurance products sold in Pennsylvania will not be promptly replaced by other interstate insurers. Accordingly, we cannot conclude that § 641 places an impermissible burden upon interstate commerce.

The district courts disinguish *Exxon* on the grounds that the statute at issue in that case "did not have the practical effect of indirectly regulating the refiners' ownership of other entities outside the state." *USAA*, 680 F.Supp. at 722. In that light, the courts concluded that "unlike [§ 641], the Maryland statute in the *Exxon* case did not reach beyond the borders of the state," *id.* and, because § 641 precluded Pennsylvania insurers from affiliations with S & L's wherever located, its affect upon interstate commerce was different from that involved in *Exxon*. We believe that this narrow reading of *Exxon* is in error.

We do not view the Court's decision in *Exxon* as predicated upon the conclusion that the state statute did not regulate beyond the Maryland borders. Indeed, we note that Justice Blackmun's dissent departs from the Court majority precisely because of the recognition that the Maryland statute had the actual effect of precluding many out-of-state businesses from participating in the retail market in Maryland. *See Exxon*, 437 U.S. at 138, 98 S.Ct. at 2220 ("[o]f the class of enterprises excluded entirely from participation in the retail gasoline market, 95% were out-of-state firms.") (Blackmun, J., concurring and dissenting). In our view, the focus of the majority

opinion was the *manner* by which the statute regulated. The Court concluded that the fact that the statute regulated *indiscriminately* compelled the conclusion that the Commerce Clause had not been violated.[19]

As the Supreme Court has noted, "[t]he Commerce Clause [does not] protect[] the particular structure or method of operation in a retail market . . . *the Clause protects the interstate market, not the particular interstate firms, from prohibitive or burdensome regulations.*" *Exxon*, 437 U.S. at 127, 98 S.Ct. at 2215 (emphasis added) (citation omitted). Thus, although § 641 may provide somewhat of a boon to independent insurance agents who sell insurance in Pennsylvania, that boon is no less available to independent agents who are based outside of the state as it is to such agents for whom Pennsylvania is home. To the extent that the regulation infringes upon the commercial association rights of lending institutions outside of Pennsylvania, it infringes upon those same rights of lending institutions within Pennsylvania. In that light, even if § 641 is viewed as "protectionist" of the economic interests of unaffiliated insurers, because it does not afford that protection only to local agents, it is not violative of the Commerce Clause.[20]

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[19] We are not unaware that, even a statute that is facially indiscriminate may nonetheless be determined to be violative of the Commerce Clause because it has a discriminatory effect. Nothing in the records of the present cases, or in the decisions of the district courts, however, indicates that enforcement of § 641 will have the effect of favoring in-state interests over out-of-state interests.

[20] Finally, USAA and Ford argue that heightened scrutiny of § 641 is proper because of the significant need for uniformity in the regulation in this area. Their argument on this point appears, essentially, to be that the prohibition of a "financially sound" institution from eligibility to be a purchaser of a S & L conflicts with the federal policy. They argue that, pursuant to *Southern Pacific*, the Commerce Clause should render the statute unconstitutional because the "federal government has a compelling interest 'in the uniformity of regulation' in connection with the ownership, acquisition and control of federally insured thrift institutions." Appellee

V. *Conclusion*

In light of the foregoing, we reach the following conclusions in these cases: In *Ford*, we will affirm the decision of the district court not to abstain. We will also affirm the district court's decision that § 641 was inapplicable to Ford's acquisition of the two failing Ohio S & L's under the provisions of 12 U.S.C. § 1730a(m) (1982), and the branches authorized in connection with that acquisition, because the state statute has been preempted by the federal law concerning the emergency acquisition of failing thrifts. We will also affirm the district court's conclusion that § 641 is not preempted by federal law in its application to circumstances other than those provided by § 1730a(m). We will reverse, however, the district court's judgment that § 641 is violative of the dormant Commerce Clause.

In *USAA*, we will affirm the decision of the district court not to abstain, although we will not affirm the

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(Ford) Brief at 30 (quoting *Southern Pacific*, 325 U.S. at 770, 65 S.Ct. at 1521). To succeed on this argument, however, the appellees must demonstrate the presence of a national scheme to regulate completely the transfer and affiliations of every S & L throughout the country. They have failed in that demonstration and neither is the existence of such a scheme apparent on the face of the federal legislation.

In our view, the appellees' assertions on this point are merely the preemption argument dressed in different clothing. *See Rice*, 331 U.S. at 230, 67 S.Ct. at 1152 (federal preemption will be inferred where the field is one in which the federal interest is so dominant that the "federal system will be assumed to preclude enforcement of state laws on the same subject"), *see also, Hillsborough County*, 471 U.S. at 713, 2374. (sic) As we have held in this opinion *supra*, to the extent that § 641 imposes restrictions or regulations that affect the ability of an otherwise viable institution to purchase a *failing* thrift, it conflicts with federal legislation, and, therefore, is preempted. Apart from that circumstance, however, we do not discern a conflict between the state statute and federal regulation of the savings and loan industry that requires invalidation of the state statute.

rationale upon which it relied. We will also affirm the holding of the district court that § 641 is not preempted by federal law in its application to USAA's establishment of a Texas savings and loan company. We will reverse, however, the district court's judgment that § 641 is violative of the dormant commerce clause and we will remand this matter to the district court for its determination of the viability of USAA's claim that the state statute is otherwise inapplicable to it. *See supra*, n. 11.

All parties in these cases will bear their own costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-5077, 88-5078 & 88-5121

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange

and

USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company,

and

USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,

and

USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance

v.

MUIR, WILLIAM J., III,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER,

Appellants in 88-5077

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange

and

USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company,

and

USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,

and

USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance

v.

MUIR, WILLIAM J., III,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER,

CONSTANCE FOSTER,
Appellant in 88-5078

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange

and

USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company

and

USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company

and

USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance

v.

MUIR, WILLIAM J., III,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS; JOHN ULRICH, JR.; PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; CHARLES P. LEACH, JR.; PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS; and HAROLD E. ALEXANDER,

UNITED SERVICES AUTOMOBILE ASSOCIATION,
USAA CASUALTY INSURANCE COMPANY,
USAA LIFE INSURANCE COMPANY, and
USAA ANNUITY AND LIFE INSURANCE COMPANY,
Appellants in 88-5121

On Appeal from the United States District Court for the Middle District of Pennsylvania

(D.C. Civil Action No. 84-1596)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Leon Higginbotham
Circuit Judge

Dated: June 9, 1989

APPENDIX C

UNITED STATES DISTRICT COURT
M.D. PENNSYLVANIA

Civ. No. 84-1596

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Plaintiffs,

v.

CONSTANCE FOSTER,
Defendant.

Dec. 23, 1987

Michael L. Browne, Christopher K. Walters, Reed, Smith, Shaw & McClay, Philadelphia, Pa., Robert B. Hoffman, Reed, Smith, Shaw & McClay, Harrisburg, Pa., for plaintiffs.

Andrew S. Gordon, Ellis M. Saull, Dist. Attys. Gen., Allen C. Warshaw, Sr. Deputy Atty. Gen., Office of Atty. Gen., Harrisburg, Pa., for defendant.

Karen Balaban, William Balaban, Harrisburg, Pa., for intervenors.

MEMORANDUM

HERMAN, District Judge.

In this action against the Insurance Commissioner of the Commonwealth of Pennsylvania (hereinafter "Commissioner"), the plaintiffs, United Services Automobile Association, U.S.A.A. Casualty Insurance Company, U.S.A.A. Life Insurance Company, and U.S.A.A. Annuity and Life Insurance Company (hereinafter "USAA") challenge the constitutionality of Section 641 of Penn-

sylvania's Insurance Department Act of 1921, 40 Pa. C.S.A. § 281.[1] Presently before us are three motions: the motion of the Commissioner for summary judgment on abstention grounds; the motion of USAA for summary judgment on pre-emption grounds; and the motion of USAA for summary judgment on Commerce Clause grounds.

I. BACKGROUND

USAA, a reciprocal interinsurance exchange organized and existing under the laws of Texas with its principal place of business in San Antonio, is licensed to sell insurance in Pennsylvania. In April, 1984, USAA Financial Services, a wholly-owned subsidiary of USAA, filed an application with the Federal Home Loan Bank Board for a Federal Savings Bank Charter for the USAA Federal Savings Bank. The bank received its charter and began operations in San Antonio in December, 1983. The bank has no locations in Pennsylvania.

In July and August, 1984, the Pennsylvania Insurance Department notified USAA that its indirect ownership of the bank in Texas constituted a violation of Section 641 of the Insurance Department Act and advised USAA that it must divest itself of the bank or risk revocation of its licenses to transact insurance business in Pennsylvania. In November, 1984, USAA brought the present action under 42 U.S.C. § 1983, seeking declaratory and

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[1] Section 641, in pertinent part, provides:

> (b) No lending institution, public utility, bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing, or officer or employe thereof, may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State either as a broker or as an agent except that a lending institution or bank holding company, subsidiary or affiliate of a lending institution may be licensed to sell credit life, health and accident insurance and to sell and underwrite title insurance in accordance with regulations promulgated by the Insurance Commissioner.

injunctive relief against the Commissioner, and, in December, 1984, the Commissioner initiated state agency proceedings to revoke the plaintiffs' insurance licenses.

After consideration of the motion of the Commissioner to dismiss the federal action on abstention grounds, we ordered the action dismissed on September 30, 1985. USAA appealed from our order.

In June, 1986, the Court of Appeals for the Third Circuit reversed the judgment and remanded the case for further proceedings consistent with its opinion. *See United Services Automobile Association v. Muir*, 792 F.2d 356 (3d Cir. 1986). Thereafter, we issued a preliminary injunction which prohibits the Commissioner from revoking the plaintiffs' insurance licenses pending further order.

In October, 1986, the Commissioner filed a Petition for a Writ of Certiorari in the Supreme Court. The Supreme Court denied the petition.

On August 21, 1987, we granted the motion of the Pennsylvania Association of Independent Insurance Agents, John M. Ulrich, Jr., Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc., Charles P. Leach, Jr., Pennsylvania Association of Life Underwriters and Harold E. Alexander, to intervene in the action. Oral argument on the motions for summary judgment was held September 16, 1987.

II. ABSTENTION

In our September, 1986, ruling in this case, we dismissed USAA's complaint on abstention grounds. We relied on the three different types of abstention set forth in *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); and *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Court of Appeals for

the Third Circuit reversed our ruling and held that none of the three types of abstention applied. *USAA v. Muir*, 792 F.2d 356. On remand, the Insurance Commissioner has again moved for abstention based solely on the *Younger* abstention. For the following reasons, we shall deny the motion.

The Commissioner has renewed the motion for summary judgment on abstention grounds basing his argument on the holding in the recent Supreme Court case of *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986). In *Dayton*, the Supreme Court held that *Younger* abstention applies "to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Id.* at 627, 106 S.Ct. at 2723, 91 L.Ed.2d at 522. The Court further ruled that even if the state administrative agency could not itself consider the constitutionality of a state statute it is called upon to enforce, "it would seem an unusual doctrine . . . to say that [the agency] could not construe its own statutory mandate in the light of federal constitutional principles. . . . In any event, it is sufficient . . . that constitutional claims may be raised in state court judicial review of the administrative proceeding." *Id.* at 629, 106 S.Ct. at 2724, 91 L.Ed.2d at 523.

Although we agree with the Commissioner that the holding of the Supreme Court in *Dayton* appears to overrule the Third Circuit's holding in *USAA v. Muir* on the issue of *Younger* abstention, the Third Circuit's latest decision involving *Younger* abstention, *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3d Cir. 1987), requires us to reject the Commissioner's motion for summary judgment. In addition to the requirement under the *Younger* abstention doctrine that there be an ongoing state proceeding in which constitutional claims can be raised, the

Third Circuit in *Sullivan* added the requirement that, in order to invoke *Younger* abstention, irreparable injury may not be threatened.[2]

In *USAA v. Muir*, the Third Circuit decided that USAA would suffer irreparable harm if we were to abstain.[3] Therefore, on the issue of abstention, we are bound by the Third Circuit's prior opinion in this case. If the Third Circuit in *Sullivan* had not added the requirement of no threat of irreparable harm to the *Younger* abstention doctrine, we would have leaned toward granting the Commissioner's renewed motion for summary judgment on abstention grounds. However, because of the *Sullivan* opinion, we are clearly bound

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[2] The court in *Sullivan* stated:

> Since *Younger*, the Court has recognized that extraordinary circumstances may threaten irreparable injury which justifies federal intervention in ongoing state proceedings even in the absence of bad faith or harassment by state officials. Although the Court has acknowledged that the nature of the term 'irreparable harm' makes it difficult to define every situation the term encompasses, the Court has stated that circumstances are extraordinary in the relevant *Younger* sense where they create 'an extraordinarily pressing need for immediate federal equitable relief,' and do not simply present a unique or unusual factual situation. Such need for relief appears justified upon a showing ' "that an injunction is necessary in order to afford adequate protection of constitutional rights." '

Sullivan, 811 F.2d at 179 (citations omitted).

[3] The Third Circuit held:

> Weighing the legal issues and the devastating economic consequences a license revocation would impose upon USAA on the one hand and the vague claim of risks to the state from a Texas bank not doing business in Pennsylvania on the other hand, we conclude that the district court erred by holding that the state appeal and supersedeas procedures adequately protected USAA's interests.

USAA v. Muir, 792 F.2d at 363.

by the Third Circuit's decision in *USAA v. Muir* under the law-of-the-case doctrine.[4]

III. PRE-EMPTION

USAA has moved for summary judgment on pre-emption grounds, arguing that Section 641(b) as applied to USAA is invalid under the Supremacy Clause of the United States Constitution. Specifically, USAA claims that Section 641(b) is preempted by the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1461 *et seq.*, the National Housing Act, 12 U.S.C. §§ 1730, 1730a, and the regulations promulgated pursuant to these acts. USAA offers two reasons to support its claim of pre-emption: (1) Congress has occupied the entire field regarding the organization, ownership, incorporation and operation of federal savings banks; and (2) Section 641 is in actual conflict with federal law, standing as an obstacle to the full accomplishment of the federal government's purposes in that the federal government, through the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation, approved USAA's ownership of the savings bank in Texas.

Pre-emption of a state law by a federal law or regulation has its roots in the Supremacy Clause which provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . .

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[4] The law-of-the-case doctrine applies to issues that were discussed by the court in a prior appeal. *Schultz v. Onan Corp.*, 737 F.2d 339, 345 (3d Cir. 1984). Generally, a court will refuse to reopen what has already been decided. *Zichy v. City of Philadelphia*, 590 F.2d 503, 508 (3d Cir. 1979). The court, however, has the duty to apply "a supervening rule of law despite its prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case." *Id.* Based on this duty to apply a supervening rule of law, we would have considered the defendant's renewed motion based on the Supreme Court's ruling in *Dayton* had the *Sullivan* decision not explained the Third Circuit's stance on the irreparable harm requirement.

shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. It is well-settled that pre-emption may occur in any of the following three ways:

> First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Michigan Canners and Freezers Assoc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984) (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)) (citations omitted).

USAA does not argue that Congress has explicitly defined its intent to pre-empt Section 641(b). Instead, USAA argues that pre-emption has occurred in either the second or the third way as set forth in the above-excerpted quote from *Michigan Canners*.

We shall first address USAA's argument that Section 641 is pre-empted because Congress has occupied the entire field of regulation pertaining to savings banks. The Supreme Court has explained that congressional intent to pre-empt may be inferred where the scheme of federal regulations is "sufficiently comprehensive to make

reasonable the inference that Congress 'left no room' for supplementary state regulation," *California Savings and Loan Association v. Guerra*, 479 U.S. 272, ——, 107 S.Ct. 683, 689, 93 L.Ed.2d 613, 623 (1987); or "where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

In considering whether or not to infer pre-emption from the federal law's occupancy of the field or dominant federal interest, the Supreme Court has expressed the following cautionary note: "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Id.* at 719, 105 S.Ct. at 2378. This cautionary note is in accord with other statements by the Supreme Court to the effect that pre-emption analysis is to be "tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with operation of both statutory schemes with one another rather than holding one completely ousted,'" *Merrill Lynch v. Ware*, 414 U.S. 117, 127, 94 S.Ct. 383, 389-90, 38 L.Ed.2d 348 (1973); and "federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963).

Analyzing the case before us in light of these principles, we find that Section 641(b) is not pre-empted because of occupancy of the field by federal law.

It should first be noted that we do not dispute many of the arguments advanced by USAA. For example, we agree that the federal scheme under HOLA and the National Housing Act creates "a uniform and comprehensive federally regulated thrift system without state interference." [5] Furthermore, after carefully considering the Supreme Court's decision in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), we recognize, as USAA points out, that "Congress invested the Board with broad authority to regulate federal savings and loans so as to effect the statute's purposes, and plainly indicated that the Board need not feel bound by existing state law." *Id.* at 162, 102 S.Ct. at 3027. In fact, the broad authority vested in the Board is clearly expressed in the federal regulations:

> The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of a Federal association.

12 C.F.R. § 545.2. Lastly, we do not dispute USAA's statement that the federal regulations governing federal savings banks are voluminous and comprehensive.

Despite our agreement with these arguments advanced by USAA, we cannot infer that federal law has left no room for a state law, such as Section 641(b), which concerns the state's insurance industry. While the federal regulations do occupy the entire field of regulation concerning the *operation* of federal savings banks, we can-

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[5] Plaintiff's Brief Supporting Motion for Summary Judgment in Preemption Issue at 18.

not infer that these federal regulations also occupy the field of regulation concerning the relationship of these banks with other entities, such as insurance companies. The Supreme Court in *Fidelity Federal Savings and Loan* expressly suggested that Congress may *not* have occupied the entire field:

> As we noted above, a savings and loans' mortgage lending practices are a critical aspect of its "operation," over which the Board unquestionably has jurisdiction. Although the Board's power to promulgate regulations exempting federal savings and loans from the requirements of state law may not be boundless, in this case we need not explore the outer limits of the Board's discretion.

Fidelity Federal Savings & Loan, 458 U.S. at 167, 102 S.Ct. at 3029-30.

We find here that Section 641(b) does not address the *operations* of federal savings banks. In other words, it does not attempt to govern the operations of USAA's bank in Texas. Instead, Section 641(b) simply regulates the relationships between licensed insurers in Pennsylvania and other non-insurance entities. Hence, it is our opinion that the federal regulations governing the operations of federal savings banks and the state statute governing affiliations and ownership of insurance companies can coexist.

In a similar vein, USAA's argument that the sheer volume and comprehensiveness of the federal regulations governing federal savings banks indicate the intent to occupy the entire field fails in light of the Supreme Court's statement in *Hillsborough County*:

> We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress.

> To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough County, 471 U.S. at 717, 105 S.Ct. at 2377. In the instant case, the regulations are admittedly comprehensive; however, the Home Loan Bank Board has indicated an intent to pre-empt only those regulations governing the *operations* of federal savings banks.

USAA's alternative ground for arguing that Section 641(b) is pre-empted is that the state statute is in actual conflict with the federal law. An actual conflict between federal law and state law may pre-empt the state law to the extent it actually conflicts with the federal law. *California Savings and Loan Association*, 479 U.S. at ——, 107 S.Ct. at 689, 93 L.Ed. at 623. Such a conflict "occurs either because 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 [83 S.Ct. 1210, 1217], . . ., or because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.*, (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)). USAA argues that Section 641(b) stands as an obstacle to the federal government's purpose when it approved USAA's ownership of USAA's bank in Texas.

Determining whether state law frustrates congressional purpose is a two-step procedure. First, the court must engage in construction and interpretation of the state and federal statutes, and only then determine if a conflict exists. "[I]n deciding whether any conflict is present, a court's concern is necessarily with 'the nature of the activities which the States have sought to regulate,

rather than on the method of regulation adopted.'" *Chicago and North Western Transportation Company v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317-318, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981) (*quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243, 79 S.Ct. 773, 778, 3 L.Ed.2d 775 (1959)).

It is clear from the state statute that Pennsylvania is seeking only to regulate the *insurance* industry and not the banking industry. Section 641(b) deals exclusively with who may be licensed to sell insurance in this state. It says nothing about who may appropriately become a bank or savings and loan holding company. Admittedly, an insurance company that becomes affiliated with a savings and loan holding company will risk losing its insurance license in Pennsylvania, but that is because the state legislature has determined an affiliation between an insurance company and a saving and loan holding company would adversely affect the insurance industry. The statute does not regulate or protect any industry other than the insurance industry.

It is equally clear that the federal laws in question regulate only the savings and loan industry and not the licensing of insurance companies by states. Indeed, the House Report concerning the Savings and Loan Holding Company Amendments of 1967 explicitly states the purpose of that Act to be

> to provide a comprehensive statutory framework for the registration, examination and regulation of holding companies controlling one or more savings and loan associations, the accounts of which are insured by an agency of the Federal Government—the Federal Savings and Loan Insurance Corporation.

H.R.Rep. No. 997, 90th Cong., 2d sess., 1968 U.S. Code Cong. & Ad.News 1601, 1603. Nothing in the Act nor in the Federal Home Loan Bank Board regulations even intimates that the purpose of the Act was to allow

insurance companies to become savings and loan holding companies. Furthermore, nothing in either of the Acts guarantees a state license to sell insurance to an insurance company that becomes affiliated with a savings and loan. The federal and state acts are aimed at two completely separate purposes; they regulate two separate industries; and nothing in the federal act requires states to allow an affiliation between the two. Because there is no actual conflict between federal law and state law in the instant case, USAA has failed to demonstrate federal pre-emption of Section 641(b).

For the foregoing reasons, we shall deny USAA's motion for summary judgment on pre-emption grounds.

IV. COMMERCE CLAUSE

USAA has also moved for summary judgment on Commerce Clause grounds. USAA argues that Section 641(b), when applied to USAA, places a severe burden on interstate commerce, a burden which is excessive in relation to the putative local benefits derived from Section 641(b). USAA further argues that Section 641(b) forces USAA either to cease transacting their insurance business with citizens of Pennsylvania or to surrender their federally-approved ownership of a federal bank in Texas.[6]

The Commerce Clause of the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has interpreted the Commerce Clause "not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441

[6] USAA does not argue that the Pennsylvania law discriminates against interstate commerce in favor of local business. Indeed, it could not make such an argument because Section 641(b) treats all insurance companies and all savings and loans alike, whether or not they are based in Pennsylvania.

U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979). Although a state has the power to regulate matters of legitimate local concerns, it may not impede the free flow of commerce by "discriminating against the articles of commerce coming from outside the state," *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 36, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980), or by regulating matters of predominant national concern "which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915 (1945). The Commerce Clause "also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state." *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43, 102 S.Ct. 2629, 2641, 73 L.Ed.2d 269 (1982). Similar to the limitations placed on the jurisdiction of state courts, "any attempt 'directly' to assert extraterritorial jurisdiction . . . would offend sister States and exceed the inherent limits of the State's power." *Id.* at 643, 102 S.Ct. at 2641, (*quoting Shaffer v. Heitner*, 433 U.S. 186, 197, 97 S.Ct. 2569, 2576, 53 L.Ed.2d 683 (1977)).

A state statute that regulates interstate commerce *indirectly* may also be precluded by the Commerce Clause. The appropriate test to apply to a regulation that indirectly regulates interstate commerce is the test enunciated by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443[80 S.Ct. 813, 816, 4 L.Ed.2d 852 (1960)]. If a

> legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142, 90 S.Ct. at 847.

Because Section 641(b) regulates "even-handedly to effectuate a legitimate local public interest," and because it affects commerce only incidentally, we have determined that the *Pike* test is the appropriate test to apply to the facts of the case at bar.

Thus, in accordance with the *Pike* test, we must uphold Section 641(b) unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." We shall first examine the local benefits conferred by Section 641(b). The Commissioner and the intervenors suggest three primary local benefits: (1) to protect the insurance industry from, *inter alia*, unfair competition and economic concentration; (2) to protect consumers from coercive "tie-ins" and other forms of subtle pressure tactics by lending institutions; and (3) to protect the ability of the insurance examiners to monitor adequately the insurance industry. The Commissioner argues that these local benefits will be adversely affected if affiliations between insurance companies and lending institutions are permitted. It is our opinion, however, that in this case the adverse effects of affiliation are either not present where the affiliated bank is outside the jurisdiction, or are readily prevented in ways less burdensome than is prescribed in Section 641(b).

First, the Commissioner and intervenors express concern that without the protection of Section 641(b), the insurance industry faces the risk of unfair competition and economic concentration. However, testimony by Ronald Chronister, the former Acting Deputy Insurance Commissioner, indicates that concentration of economic power

and decreased competition is not a concern with respect to USAA's affiliation with a Texas bank. *See* Notes of Testimony of Ronald Chronister, November 14, 1985, at 17-18. While we agree with the Commissioner that the consolidation of a large insurer and a large bank, such as Citibank, would produce significant economic clout,[7] here we are dealing with a small bank in Texas which at the present time has no locations in Pennsylvania.[8] Secondly, the Commissioner and the intervenors state that Section 641(b) protects the consumer particularly from subtle "tie-in" sales.[9] The risk of a "tie-in" sale, however, to a resident of Pennsylvania by a Texas bank is almost "nil." *Id.* at 11. Last, the Commissioner and the intervenors suggest that Section 641(b) protects the insurance examiner's ability to examine the solvency of affiliated insurance companies. While the prohibition of all affiliations between lending institutions and insurance companies provides an easier task for the insurance examiners in their examinations of insurance companies, we find that even in the absence of Section 641(b) the insurance examiners would still be able to examine the solvency of affiliated companies. Under the Federal Home Loan Bank Board regulations, the results of bank examinations by the Federal Home Loan Bank Board are available "to other agencies of the United States or a State for use where necessary in the performance of their official duties." 12 C.F.R. § 505.5(b).[10]

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[7] Notes of Testimony of Ronald Chronister, November 14, 1985, at 16-17.

[8] It should be noted, however, that several Pennsylvania residents have credit cards issued by the Texas bank. While we have considered this fact, we find it but one small factor of the many factors we have weighed.

[9] A "tie-in sale" occurs when a bank conditions the granting of credit upon the purchase of insurance from an affiliated agency or insurance company.

[10] We acknowledge the unsworn declaration of Ronald Chronister filed September 10, 1987, that expresses the Insurance Department's

Now we shall turn to the burdens imposed on commerce by Section 641(b). We find that Section 641(b)'s impact on commerce, when it is applied to USAA, is clearly excessive in relation to its putative local benefits. The Texas bank was properly approved by the appropriate federal agencies. It operates its business in accordance with the applicable federal regulations. It has no locations in Pennsylvania. And, specifically, it sells no insurance in Pennsylvania. USAA's insurance company has more than 40,000 policyholders in Pennsylvania. Its premium income in Pennsylvania exceeds $35 million per year. Furthermore, it services officers and members of the United States armed forces who frequently move about the nation.

If the Insurance Department enforces Section 641(b) against USAA, USAA will be forced to abandon its insurance business in Pennsylvania or relinquish its interest in the Texas bank. If USAA opts to allow its insurance license to be revoked, this revocation could result in devastating economic consequences.[11] On the

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difficulty in obtaining reports of examinations pursuant to 12 C.F.R. § 505.5. Regardless, the procedure is available to the Insurance Department and, therefore, it is not impossible for the Department to obtain reports of examinations prepared by the Federal Home Loan Bank Board.

[11] The Third Circuit stated the following in *USAA v. Muir* in regard to the irreparable harm USAA would suffer if its insurance license were revoked:

> The threat of revocation might alarm an unknown of USAA's more than 40,000 Pennsylvania policyholders into cancelling their insurance. Nationwide, a revocation order even if stayed, would prevent USAA from continuing unqualifiedly to represent that its insurance contracts are available in all 50 states. Because USAA limits its policies primarily to commissioned officers of the United States armed forces, persons who move frequently in the service of their country, the inability to offer insurance coverage in every state may well be a major blow.
>
> Weighing the legal issues and the devastating economic consequences a license revocation would impose upon USAA on

other hand, if USAA were to relinquish its interest in the Texas bank, it would be giving up that which the federal government has authorized it to own. Although Section 641(b) does not require USAA to relinquish its interest in the Texas bank, Section 641(b) certainly has the practical effect of interfering with the business of the Texas bank. We agree with USAA that the choice facing USAA, if Section 641 is enforced against it, is, in practical effect, no choice at all. -

The instant situation is much like that encountered by the Supreme Court in *Edgar v. Mite Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). There, in an effort to protect Illinois shareholders from hostile tender offers, the Illinois legislature passed a law regulating tender offers made to both in-state and out-of-state corporations. The Supreme Court observed that the "most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere." *Id.* at 643, 102 S.Ct. at 2641. Weighing this burden against the legitimate local concerns of protecting resident security holders and regulating the internal affairs of companies incorporated under Illinois law, the Court held:

> We agree with the Court of Appeals that these asserted interests are insufficient to outweigh the burdens Illinois imposes on interstate commerce.
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> While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting non-resident shareholders. In-

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the one hand and the vague claim of risks to the state from a Texas bank not doing business in Pennsylvania on the other hand, we conclude that the district court erred by holding that state appeal and supersedeas procedures adequately protected USAA's interests.

USAA v. Muir, 792 F.2d at 362-63.

> so far as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.

Id. at 644, 102 S.Ct. at 2641. The same can be said of the instant Pennsylvania law. The burden imposed by Section 641(b) is clearly excessive in relation to the local benefits.

Furthermore, insofar as Section 641(b) is needed to regulate affiliations between insurance companies and lending institutions *within* Pennsylvania where the concerns of the Commissioner and the intervenors become very real, the statute can be more narrowly drawn so that its burden on interstate commerce is lessened and its objectives are still effectuated. In keeping with the standard set forth in *Pike* and followed in *Edgar*, we find that in the case before us the burden imposed on commerce by the instant Pennsylvania law is clearly excessive in relation to the putative local benefits.

The Commissioner argues that we should follow as controlling precedent the case of *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). In *Exxon*, the plaintiffs challenged, on Commerce Clause grounds, a Maryland statute prohibiting producers and refiners of petroleum products from operating retail service stations within the state. The Supreme Court held that the Maryland statute was constitutional; the statute did not discriminate against interstate goods, favor local producers or refiners, or impermissibly burden interstate commerce. One of the plaintiff's arguments was that the divestiture requirements would cause several refiners to stop selling in Maryland and deprive consumers of their services. In response, the Court stated that these factors did not warrant a finding of an impermissible burden. The Court further stated that "[i]t may be true that the consuming public will be injured by the loss of . . . stations operated by the independent refiners, but again that argument relates to the wisdom of the statute,

not to its burden on commerce." *Id.* at 128, 98 S.Ct. at 2215.

We carefully considered the instant case in light of the holding in *Exxon.* Indeed, there is one obvious similarity. A corporation which has been conducting business within a state is required by a state statute to cease doing business in that state. Similar to the independent refiners in the *Exxon* case, USAA, if Section 641(b) were enforced against it, would be forced to leave Pennsylvania due to a state law. Because of this basic similarity between *Exxon* and the instant case, it would be simple to end the comparison of the cases at that point and declare Section 641(b) constitutional. However, we find that unlike the Pennsylvania statute in our case, the Maryland statute in the *Exxon* case did not reach beyond the borders of the state. It simply and unequivocally banned refiners and producers from operating retail stations. It did not have the practical effect of indirectly regulating the refiners' ownership of other entities outside the state.

In contrast, Section 641(b), in practical effect, reaches beyond Pennsylvania's borders to interfere with the ownership of a federal savings and loan bank in Texas which was properly approved by and operates under the regulations of the appropriate federal agencies. In this sense, the instant case is more nearly like the situation presented in *Edgar* wherein the Illinois statute had the practical effect of reaching beyond the state borders to affect indirectly commerce in other states.[12]

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[12] The Commissioner also brought to our attention the cases of *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960), and *Norfolk Southern Corporation v. Oberly,* 822 F.2d 388 (3d Cir. 1987). We distinguish both cases from our case on the basis that they address environmental regulations, as opposed to economic regulations. For example, in *Huron* the Court stated:

> In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the

Finding that the burdens imposed on commerce by Section 641(b) of the Pennsylvania Insurance Department Act are clearly excessive in relation to the putative local benefits and that Section 641(b) could be more narrowly drawn and still serve the purposes for which the statute was enacted, we find Section 641(b) as applied here unconstitutional under the Commerce Clause of the United States Constitution.[13] We shall, therefore, grant USAA's motion for summary judgment and, accordingly, enter judgment in favor of USAA and against the Insurance Commissioner.

An appropriate order will be entered.

ORDER

AND NOW, this 23rd day of December, 1987, in accordance with the accompanying Memorandum, IT IS HEREBY ORDERED that the defendant's motion for summary judgment on abstention grounds and the plaintiffs' motion for summary judgment on pre-emption grounds are denied.

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment on Commerce Clause grounds is granted. Section 641(b) of the Pennsylvania Insurance Act of 1921, 40 Pa.S. § 281, as applied to the plaintiffs,

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> Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'

Huron, 362 U.S. at 443-44, 80 S.Ct. at 816. Although the same balancing test is applicable in situations involving environmental regulations and economic regulations, it appears to us that more deference is typically given to a local or state environmental regulation.

[13] We also find that there is no genuine issue as to any material facts. Fed.R.Civ.P. 56(c).

is unconstitutional under the Commerce Clause of the United States Constitution. Accordingly, the defendant is permanently enjoined from taking further action to revoke the plaintiffs' insurance licenses.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter judgment in favor of the plaintiffs and against the defendant and to close the file in this case.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 86-561

GEORGE F. GRODE, Insurance Commissioner of the Commonwealth of Pennsylvania,
Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*

Case below, *United Services Auto. Ass'n v. Muir*, 792 F.2d 356.

Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Jan. 12, 1987. Denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 85-5662

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, and USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance Company

v.

WILLIAM J. MUIR, III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania.

Appeal of United Services Automobile Association, USAA Casualty Insurance Company, USAA Life Insurance Company, and USAA Annuity and Life Insurance Company,
Appellants.

Argued March 6, 1986

Decided June 6, 1986

Michael L. Browne, Christopher W. Walters, (Argued), J. Thomas Morris, Reed Smith Shaw & McClay, Philadelphia, Pa., Robert B. Hoffman, Reed Smith Shaw & McClay, Harrisburg, Pa., for appellants.

Leroy S. Zimmerman, Atty. Gen., Ellis M. Saull, (Argued), Deputy Atty. Gen., Andrew S. Gordon, Senior Deputy Atty. Gen., Allen C. Warshaw, Executive Deputy Atty. Gen., Office of Atty. Gen., Harrisburg, Pa., for appellee.

Before GIBBONS, BECKER, and ROSENN, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

This appeal requires us to examined various forms of abstention advanced by the district court in choosing to refrain from exercising jurisdiction. Included is an unsettled question under the abstention doctrine promulgated in *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941): whether a claim that federal statutes preempt state law under the supremacy clause raises a substantial constitutional question which permits abstention.

United Services Automobile Association (USAA) and some of its subsidiary insurance companies filed suit against William J. Muir, III, as Acting Insurance Commissioner of the Commonwealth of Pennsylvania, seeking to enjoin the state insurance department from revoking USAA's license to insure persons in Pennsylvania. The insurance department asserts that USAA following its purchase of a Texas bank is in violation of a Pennsylvania statute prohibiting mergers between financial institutions and insurers. USAA argues that such a construction of the state statute is preempted by federal banking statutes that permitted it to purchase the bank and otherwise violates the constitution. The United States District Court for the Middle District of Pennsylvania concluded that abstention applied, and dismissed the suit.[1] We disagree and reverse.

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[1] The district court had jurisdiction under 28 U.S.C. § 1331 (1982) (federal questions), 28 U.S.C. § 1332 (1982) (diversity), and 28

I.

The relevant facts as stated in USAA's complaint are not disputed in this appeal. USAA is a reciprocal interinsurance exchange [2] organized under the laws of Texas. USAA and three of its wholly owned insurance company subsidiaries, with which it filed this suit, have their principal place of business in San Antonio, Texas. They limit their insurance services primarily to commissioned officers of the United States armed forces and do business nationwide. They provided insurance services in 1983 to more than 40,000 Pennsylvania policy holders who paid more than $35,000,000 in annual policy premiums.

That year, USAA Financial Services Company (then known as USAA Development Company), a wholly owned subsidiary of USAA, applied for and received from the Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation (FSLIC) permission to organize and operate the USAA Federal Savings Bank (the Bank) in San Antonio, Texas. USAA Financial Services also received permission from the FSLIC to serve as a unitary savings and loan holding company. The insurance department does not allege that USAA

U.S.C. § 1337 (1982) (statutes affecting commerce). For diversity purposes, USAA and its subsidiaries are residents of Texas, and Muir is a resident of Pennsylvania. Dismissal following an abstention order is a final judgment reviewable by this court under 28 U.S.C. § 1291 (1982). *Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative*, 583 F.2d 104, 109 (3d Cir. 1978).

[2] In a reciprocal interinsurance exchange,

> individuals, partnerships, or corporations engaged in a similar line of business undertake to indemnify each other against a certain kind or kinds of losses by means of a mutual exchange of insurance contracts . . . whereby each member separately becomes both an insured and an insurer with several liability only.

2 *Couch on Insurance*, § 18:11 at 614-15 (2d ed. 1984).

failed to comply with any requirements of federal law in organizing the Bank. USAA has made an initial investment of more than $20,000,000 through its subsidiary to capitalize the Bank. The subsidiary holding company and the Bank are not parties to this suit. The Bank does not solicit deposits from Pennsylvania residents or do business in Pennsylvania.

In mid-1984, the Pennsylvania insurance department notified USAA that its ownership of a bank violated section 641 of the Pennsylvania Insurance Act of 1921, and that "USAA must, to continue its business in Pennsylvania, divest itself of the Bank, or, failing such divestiture, risk revocation of its license to transact insurance business in Pennsylvania." The Pennsylvania Insurance Act of 1921, section 641, as amended in 1974, provides in relevant part:

> (b) No lending institution, . . . bank holding company, savings and loan holding company [as defined in federal statutes] or any subsidiary or affiliate of the foregoing, or officer or employee thereof, may directly or indirectly, be licensed or admitted as an insurer . . . in this State. . . .
>
> (c) The Insurance Commissioner is authorized to promulgate regulations in order to effectuate the purposes of the section, which are to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions . . . against insurance companies, agents and brokers.

Codified at 40 Pa.Stat.Ann. § 281 (Purdon 1985 Supp.).

The insurance department argued that because USAA Financial Services is a federally regulated savings and loan holding company, as defined by federal statutes and USAA solely owns USAA Financial Services, the latter is its affiliate and USAA is therefore in violation of section 641(b). In reply, USAA asserted that section 641 is

ambiguous and can be read not to apply to it. Section 641(c) states that the purpose of section 641 is to help maintain the separation between lending institutions and the insurance business and minimize the possibilities of unfair competitive practices by lending institutions. Under section 641(a)(1),[3] a lending institution means any institution that does banking business in Pennsylvania. By reading parts (a)(1) and (c) of section 641 together, USAA argued that the purpose of the section is limited to preventing financial institutions doing business in *Pennsylvania* from competing or being affiliated with Pennsylvania insurers; as the Bank is based and does business only in Texas, the section does not apply to USAA.

USAA and its plaintiff subsidiaries filed suit in the district court under 42 U.S.C. § 1983, alleging that the insurance department's proposed reading of section 641 violated the supremacy, equal protection, and due process clauses of the constitution, and seeking declaratory and injunctive relief. One month after USAA filed suit, the insurance department commenced state administrative proceedings for the revocation of USAA's insurance licenses in Pennsylvania and filed in the district court a motion to dismiss the suit on abstention grounds. While the district court considered this motion, USAA filed a motion for summary judgment on preemption grounds. Citing *Pullman, supra*, *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), and *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the district court concluded that it should ab-

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[3] Section 641(a)(1) provides:

(a) As used in this section [641]:

(1) "Lending institution" means *any institution* that accepts deposits and lends money *in the Commonwealth of Pennsylvania*, including banks and loan associations, but excluding insurance companies.

Codified at 40 Pa.Stat.Ann. § 281(a)(1) (emphasis added).

stain from addressing USAA's suit, and dismissed the suit without considering USAA's summary judgment motion. USAA appealed.

On November 22, 1985, this court granted a motion for an injunction preventing the insurance department from revoking USAA's licenses pending resolution of this appeal. The Pennsylvania Insurance Commissioner has heard testimony in the administrative proceedings to revoke USAA's licenses, but, as of oral argument, he had not announced any decision.

II.

Abstention from the exercise of federal jurisdiction is, in all its forms, "the exception, not the rule." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). It is an extraordinary and narrow exception to the district court's duty to adjudicate a controversy properly before it, justified only in the exceptional circumstances where resort to state proceedings clearly serves an important countervailing interest. *Id.*

In reviewing abstension decisions, appellate courts apply the various criteria for abstention articulated by the Supreme Court in much the same way they would apply provisions of a statute. 1A J. Moore, *Federal Practice* ¶ 0.203[1] at 2106 (1985). A district court has little or no discretion to abstain in a case that does not meet traditional abstention requirements. *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1985). Within these constraints, determination whether the exceptional circumstances required for abstention exist is left to the district court, and will be set aside on review only if the district court has abused its discretion. *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181, 14 L.Ed.2d 50 (1965); *United States v. City of Pittsburgh*, 757 F.2d 43, 45 (3d Cir. 1985). Determinations that are essentially legal, such as deciding whether in-

terpretation of a state law is unsettled, are reviewed de novo on appeal. *D'Iorio v. County of Delaware*, 592 F.2d 681, 686 (3d Cir. 1978), *overruled on other grounds, Kershner v. Mazurkiewicz*, 670 F.2d 440 (3d Cir. 1982) (in banc). We therefore turn to an analysis of the abstention grounds on which the district court relied.

III.

Pullman abstention, as most recently defined by the Supreme Court, instructs "that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984). USAA advances three principal grounds for not applying *Pullman* abstention in this case: there is no unsettled question of state law; abstention would cause USAA substantial and irreparable economic harm; and its preemption claim does not constitute a substantial federal constitutional question.

A.

For *Pullman* to apply, the state statute must be "obviously susceptible of a limiting construction" and "a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary" is insufficient. *Hawaii Housing*, 467 U.S. at 237, 104 S. Ct. at 2327 (emphasis in original). A statute is unsettled for Pullman purposes when two of its provisions are contradictory. *Georgevich v. Strauss*, 772 F.2d 1078, 1090-91 (3d Cir. 1985) (in banc), *cert. denied*, —— U.S.——, 106 S.Ct. 1229, 89 L.Ed.2d 339 (1986). In seeking *Pullman* abstention, the insurance department has argued that the provisions of section 641 are ambiguous and contradictory, and that with no state court decisions interpreting the section, its meaning is unsettled. In reply, USAA contends that the insurance department's

interpretation of the laws it is charged with enforcing and its actions implementing that interpretation renders the statute unambiguous.

The Supreme Court has held that *Pullman* abstention is not appropriate if an otherwise ambiguous statute has been authoritatively construed by the state courts, *see e.g., Kusper v. Pontikes*, 414 U.S. 51, 55-56, 94 S.Ct. 303, 306-07, 38 L.Ed.2d 260 (1973), but it has not held that an *administrative* interpretation will suffice as an authoritative reading of state law. Although one court has suggested that an administrative interpretation of a statute that creates a constitutional problem eliminates the statute's ambiguity, the challenged statute in that case was clear on its face and not susceptible of any other construction. *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1126 (8th Cir. 1982). Indeed, an administrative interpretation that would moot the constitutional issue raised by another reading of an ambiguous statute fortifies the claim for abstention. *See, e.g., Bellotti v. Baird*, 428 U.S. 132, 148, 96 S.Ct. 2857, 2866, 49 L.Ed.2d 844 (1976); *Georgevich*, 772 F.2d at 1090-91.

Generally, an administrative interpretation of a facially ambiguous state statute will not remove the ambiguity, for *Pullman* purposes. *See Anderson v. Babb*, 632 F.2d 300, 306 (4th Cir. 1980). In keeping with statutorily imposed maxims for construing legislative intent, Pennsylvania courts ordinarily defer to administrative interpretations of statutes. *See* 1 Pa. Cons.Stat.Ann. § 1921 (c)(8) (Purdon 1985 Supp.). The interpretation given a statute by the agency charged with its execution and application "is entitled to great weight and should be disregarded or overturned only for cogent reasons or if such construction is clearly erroneous." *Cohen v. Pennsylvania Public Utility Commission*, 90 Pa.Cmwlth. 98, 494 A.2d 58, 61 (1985); *see Wiley House v. Scanlon*, 502 Pa. 228, 465 A.2d 995, 999 (1983) (administrative interpretation of a regulation followed unless it is plainly

erroneous or inconsistent with the authorizing statute). Although the insurance department's interpretation of section 641 is not clearly erroneous, USAA's cogent alternative interpretation that the statute does not apply to lending institutions that do not do business in Pennsylvania might well be adopted by the state courts. Thus, despite the deference Pennsylvania courts pay administrative interpretations, we cannot say that they would accept the insurance department's interpretation of section 641 as a definitive statement of Pennsylvania law. The state law is therefore unsettled for *Pullman* purposes.

B.

USAA also argues that the potential damage that its business would suffer during state administrative and court proceedings outweighs any important countervailing interests of Pennsylvania in abstention. The Supreme Court has held that a district court was fully justified in not abstaining when the constitutionality of a narrow and specific—though ambiguous—state statute was at issue, and any delay in settling the issue would result in substantial economic losses. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 140 & n. 3, 90 S.Ct. 844, 846 & n. 3, 25 L.Ed.2d 174 (1970) (allegedly unconstitutional state regulation threatened loss of $700,000 fruit crop). This court observed that undue delay and the increased cost of state litigation made abstention unnecessary when the federal court in resolving the constitutional issue "would not upset sensitive state programs" and the issue was neither novel nor difficult. *McKnight v. Southeastern Pennsylvania Transportation Authority*, 583 F.2d 1229, 1241 (3d Cir. 1978) (narrow due process rights of certain state employees facing dismissal). The court, however, did not find that the district court abused its discretion by abstaining. *Id.* at 1242.

The insurance department has indicated a willingness to expedite consideration of USAA's claims in state procedures, and to agree to a stay of execution in the event

of an administrative decision adverse to USAA until judicial proceedings were completed. USAA explains plausibly, however, how a state administrative order to revoke its insurance license, even if stayed, would in itself hurt its reputation generally and impair its marketing of insurance, even in other states, regardless of the time factor in litigating. It is uncontested that USAA has an excellent nationwide reputation as an insurer and is financially sound. The threat of a license revocation, a harsh sanction, may suggest in the marketplace fraudulent or illegal activity or financial instability. It could be difficult or perhaps impossible for USAA to explain to consumers and to the insurance industry that the license revocation proceedings in Pennsylvania do not represent such a sanction. The threat of revocation might alarm an unknown number of USAA's more than 40,000 Pennsylvania policyholders into cancelling their insurance. Nationwide, a revocation order even if stayed, would prevent USAA from continuing unqualifiedly to represent that its insurance contracts are available in all 50 states. Because USAA limits its policies primarily to commissioned officers of the United States armed forces, persons who move frequently in the service of their country, the inability to offer insurance coverage in every state may well be a major blow.

Weighing the legal issues and the devastating economic consequences a license revocation would impose upon USAA on the one hand and the vague claim of risks to the state from a Texas bank not doing business in Pennsylvania on the other hand, we conclude that the district court erred by holding that state appeal and supersedeas procedures adequately protected USAA's interests. *See Professional Plan Examiners of New Jersey v. Lefante*, 750 F.2d 282, 290-91 (3d Cir. 1984).

C.

Alternatively, USAA asserts that its claim that federal statutes preempt contrary state insurance laws does not pose the substantial federal constitutional claim required for *Pullman* abstention. *Hawaii Housing*, 467 U.S. at 236, 104 S.Ct. at 2327. The Ninth Circuit supports this claim for it has held that *Pullman* abstention is inappropriate for preemption questions grounded in the supremacy clause. *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 377 (9th Cir. 1982). "Although preemption has its doctrinal base in the Constitution, the question is largely one of determining the compatibility of a state and a federal statutory scheme. No constitutional issues of substance are presented." *Id.* The Tenth Circuit recently reached the same conclusion, stating in strong dictum that "[t]he Supreme Court does not appear to view federal preemption questions based only on the Supremacy Clause as the type of constitutional issues that the *Pullman* doctrine counsels courts to avoid." *Federal Home Loan Bank Board v. Empie*, 778 F.2d 1447, 1451 n. 4 (10th Cir. 1985); *see International Longshoremen's Association, AFL-CIO v. Waterfront Commission of New York Harbor*, 495 F.Supp. 1101, 1113-14 & nn. 15-18 (S.D.N.Y. 1980), *modified in other part*, 642 F.2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966, 102 S.Ct. 509, 70 L.Ed.2d 383 (1981). These recent cases appear to reflect a growing trend.

This court recently has also suggested in dicta that preemption questions are not appropriate for *Pullman* abstention. In reversing a district court abstention decision, we stated that "[i]t would be inconsistent with our paramount duty to interpret and protect federal law to invoke *Pullman* abstention in this preemption case." *Kennecott Corp. v. Smith*, 637 F.2d 181, 185 (3d Cir. 1980). Supremacy clause claims essentially involve federal policy and "the federal courts are particularly appropriate bodies for the application of preemption prin-

ciples." *Id.* (quoting *Hagans v. Lavine*, 415 U.S. 528, 550, 94 S.Ct. 1372, 1386, 39 L.Ed.2d 577 (1974)). Because the questioned state statute in *Kennecott* unambiguously conflicted with the federal statute, there was no unsettled state law question requiring *Pullman* abstention. 637 F.2d at 185.

The Supreme Court has held that "the basic question involved in [preemption claims under the supremacy clause] is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes," *Swift & Co. v. Wickham*, 382 U.S. 111, 120, 86 S.Ct. 258, 263, 15 L.Ed.2d 194 (1965), and where a case involves a nonconstitutional federal issue, the necessity for deciding which depends on the decision of an underlying state law, the federal courts, when necessary, decide both issues. *Propper v. Clark*, 337 U.S. 472, 490, 69 S.Ct. 1333, 1343, 93 L.Ed. 1480 (1949). The holdings of *Swift* and *Propper*, read together, suggest that a federal court should not abstain under *Pullman* from interpeting a state law that might be preempted by a federal law, because preemption problems are resolved through a nonconstitutional process of statutory construction. *See* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4242 at 454-55 (1978) (*Pullman* abstention inappropriate in a supremacy clause case); *cf.* 1A J. Moore, *Federal Practice* § 0.203[2] at 2141 (1985) (where clear conflict between federal and state statutes, no abstention appropriate).

Because USAA had pled other constitutional violations in its complaint, the district court declined to consider whether its preemption argument, taken alone, justified preemption. USAA's preemption claim was the sole basis for its motion for summary judgment, however, and is easily separable from its other claims should USAA choose to pursue them. Accordingly, we hold that preemption claims under the supremacy clause are not substantial federal constitutional issues for which *Pullman*

abstention might be appropriate.[4] Thus, the district court erred in deciding that the preemption claim also afforded a basis for absention on *Pullman* grounds.

IV.

Under *Burford*, abstention is appropriate "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244. If the exercise of federal review would be disruptive of state efforts to establish a coherent policy, and the policy concerns complicated local matters, abstention may be justified. *Id.* Generally, *Burford* abstention is justified where a complex regulatory scheme is administered by a specialized state tribunal having exclusive jurisdiction. *See, Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237, 241-45 (3d Cir. 1972), *cert. denied*, 410 U.S. 943, 93 S.Ct. 1367, 35 L.Ed.2d 609 (1973); *see generally*, 1A J. Moore, *supra* ¶ 0.203[2] at 2140-41 (collecting cases).

The district court in the present case found that *Burford* abstention was appropriate because the McCarran-Ferguson Act gave the states exclusive control over the regulation of insurance, 15 U.S.C. § 1012 (1982), and because section 641 is part of a complex regulatory scheme governing insurance. It cited *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980), which held that abstention was proper to allow a state regulatory body to settle claims against a liquidating insurer. The *Levy* court found it "highly significant that the state scheme has been adopted

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[4] We note that a panel of this court has very recently held on other grounds that preemption questions are often not suitable for abstention under the doctrines announced in *Burford* and *Younger*. *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Co.*, 791 F.2d 1111, 1116-17, 1117-18 (3d Cir. 1986).

pursuant to congressional authorization" under McCarran-Ferguson. 635 F.2d at 963.

The Supreme Court has established a three-part test for determining whether state regulation is part of the business of insurance, 15 U.S.C. § 1012(a) & (b), reserved to the states by McCarran-Ferguson:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S.Ct. 3002, 3009, 73 L.Ed.2d 647 (1982). "None of these criteria is necessarily determinative in itself." *Id.* The state regulations implicated in *Levy* concerned both the future coverage of policyholders and their relationship with a defunct insurer, and so were authorized under McCarran-Ferguson. The purpose of section 641, as stated in its part (c), is to prevent competition between insurers and Pennsylvania financial institutions. Unlike the regulations in *Levy*, the section is not concerned with transferring or spreading the policyholder's risk; affiliation between insurers and banks has no integral connection to the relationship between the insured and insurer; and banks are not entities within the insurance industry. Regulations such as section 641 have no part in the business of insurance under McCarran-Ferguson.

The district court also thought *Burford* abstention was appropriate because section 641 is part of an "extensive and complicated . . . state regulatory scheme." The interpretation of section 641 in this case does not require consideration of any other Pennsylvania statute and the relevant facts are simple and undisputed; no complicated regulatory scheme is involved. The insurance department has not suggested any peculiar local condi-

tions or special expertise required to interpret the statute. The state proceeding merely involves reading and construing a statute, a task for which courts are best equipped, and not administrative factual determinations, such as are involved in the setting of a proper utility rate. The district court erred in applying *Burford* to this case.

V.

Under *Younger*, "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state *judicial* proceedings that concern important state interests." *Hawaii Housing*, 467 U.S. at 237-38, 104 S.Ct. at 2327-28 (emphasis added). *Younger* abstention is required only when the state court proceedings are initiated prior to any proceedings on the substance of the merits in federal court. *Id.* at 238, 104 S.Ct. at 2328. USAA argues that *Younger* abstention was inappropriate here because state proceedings did not commence until sometime after the federal suit was filed, and because these proceedings were administrative and could not address constitutional arguments.

The commencement of administrative proceedings after the federal suit was filed, even with the intention of removing federal jurisdiction by abstention, does not preclude the application of *Younger*. So long as "the federal litigation was in an embryonic stage and no contested matter had been decided," the district court may abstain under *Younger*. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929, 95 S.Ct. 2561, 2566, 45 L.Ed.2d 648 (1975). In the present case, the district court had taken no action on the substance of USAA's claim when administrative proceedings commenced.

This court has held that "where federal intervention into state administrative proceedings would be substantial and disruptive, and *where the proceedings are adequate to vindicate federal claims* and reflect strong and

compelling state interests, the district court, pursuant to *Younger, should abstain.*" *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1017 (3d Cir. 1981) (emphasis added). The Supreme Court, however, held in *Hawaii Housing* that administrative proceedings that are part of, and are not themselves, judicial proceedings, do not trigger *Younger* abstention. 467 U.S. at 238, 104 S.Ct. at 2328. In *Hawaii Housing* an administrative arbitration proceeding, by statute, was separate from any subsequent judicial condemnation proceeding. In the present case, where an administrative decision to revoke USAA's insurance license could be appealed through the Pennsylvania courts, it is more difficult to determine whether the administrative proceeding is part of the state's judicial process.

USAA's federal claims are of constitutional dimension. As this court stated in *Red Bank*, administrative proceedings suffice for *Younger* purposes only when they "are adequate to vindicate federal claims." The Supreme Court has held that administrative proceedings that are forbidden by state law from considering federal constitution claims will not invoke *Younger* because there is no "adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). We believe a state administrative proceeding is part of its judicial process, for *Younger purposes*, only if it provides an adequate opportunity to raise constitutional challenges.

It appears to be settled law in Pennsylvania that an administrative agency may not determine the constitutionality of the statutes it applies. *Borough of Green Tree v. Board*, 459 Pa. 268, 328, A.2d 819, 825 (1974); *Delaware Valley v. Commissioner*, 36 Pa.Cmwlth. 615, 389 A.2d 234, 237 (1978). The insurance department in its internal documents has acknowledged this limitation. Because the insurance department in its administrative proceedings cannot consider USAA's constitutional argu-

ments, its administrative proceedings are not part of Pennsylvania's judicial process and the district court erred in abstaining under *Younger*.

VI.

We conclude that the district court erred in abstaining from considering USAA's preemption claim and dismissing its suit. The order of dismissal will be reversed and the case remanded to the district court for proceedings consistent with this opinion.

BECKER, Circuit Judge, concurring.

I concur in the judgment and in all but Part III.B of the majority's opinion. I write separate to explain my disagreement with one ground for the majority's holding that *Pullman* abstention is improper in this case. The majority states that the balance of the interests disfavors abstention because the potential damage to United Services Automobile Association's ("USAA") business during state administrative and court proceedings outweighs the state interests in abstention. I disagree, however, and believe that such a holding may have dangerously broad implications.

There are certainly cases in which the burdens imposed upon a plaintiff by abstention outweigh the interests served by application of the *Pullman* rule and in which the balance of interests therefore counsels against abstention. However, I do not believe that this is such a case. The state administrative and judicial proceedings that USAA would face are no more cumbersome than the state procedures available to any state litigant. The fact that USAA would have to receive an administrative ruling before it could present its case to a state court does not render its situation significantly more harmful than it if [*sic*] could proceed directly to federal court.[1] By per-

[1] This is especially true because the administrative hearing is over and the administrative decision will apparently be announced soon.

mitting USAA to prevail on this argument, the majority creates a precedent that could allow virtually any litigant faced with relatively complex state litigation to avoid the application of the *Pullman* abstention doctrine.

USAA has convinced the majority that ongoing license revocation litigation would drastically damage its reputation and thus impair its marketing of insurance. I am not convinced, however, that the harm that such litigation would impose upon USAA is significantly different from or greater than the harm that important ongoing litigation imposes upon any litigant. For example, if a company were threatened with a large fine or penalty as the result of a state proceeding, the litigation might affect the value of its stock. Yet I do not believe that this predictable side-effect of litigation would justify a denial of *Pullman* abstention, if abstention were otherwise proper. In *Bellotti v. Baird*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed. 2d 844 (1976), the continuing existence of a statute that governed the type of consent required before an abortion could be performed on a woman under the age of eighteen imposed a substantial burden on individuals to whom it applied. Although the Court acknowledged that "e[ach] day the statute is in effect, irretrievable events, with substantial personal consequences, occur," 428 U.S. at 151, 96 S.Ct. at 2868, it nevertheless held that abstention was proper. I do not believe that the type of harm that abstention would inflict upon USAA in this case is any greater than the type of harm caused to young women during that state litigation ordered in *Bellotti v. Baird*.

It is significant that, as the majority has pointed out, the insurance department has proposed ways of mitigating the harm that state litigation would impose upon USAA. It "has indicated a willingness to expedite consideration of USAA's claims in state procedures, and to agree to a stay of execution in the event of an administrative decision adverse to USAA until judicial proceedings were completed." Maj.Op. at 362. Such ex-

pedition reduces the burden that resort to the state system creates for USAA. *Cf. Bellotti v. Baird, supra*, 428 U.S. at 150-51, 96 S.Ct. at 2628 (procedure for certifying issues directly to the state supreme court reduces relative burden of abstention, so that abstention is appropriate even in case in which the "importance of speed in resolution . . . is manifest"). The proposed stay of execution of a license revocation order also distinguishes this case from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), cited by the majority, in which the plaintiffs were subject to a state enforcement order which would impair their existing business activity.

Because I believe that the harm threatened to USAA is not significantly greater than the harm that state litigation would inflict upon any litigant, I believe that the majority's assessment of the balance of the interests in this case creates an exception that could swallow the abstention rule. Indeed, almost any litigant opposing *Pullman* abstention can make out a case as strong as USAA's. I think that the balance of the interests approach as a basis for avoiding *Pullman* abstention should be reserved for extreme cases, such as *Pike v. Bruce Church, Inc., supra*, 397 U.S. at 139, 90 S.Ct. at 845-46, in which an emergency situation was presented because the company faced an imminent loss of its cantaloupe crop as a result of a state enforcement order, while only "a narrow and specific application" of a state statute was challenged as unconstitutional.[2]

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[2] Not only do I find that the harm that abstention would impose upon USAA in this case is not unusually great, but I also find that the countervailing state interest in interpreting its regulation is not unusually small. Unlike the situation in *McKnight v. Southeastern Pennsylvania Transportation Authority*, 583 F.2d 1229, 1241 (3d Cir. 1978), in which resolution of the constitutional issue before definitive state interpretation of a statute "would not upset sensitive state programs," federal intervention into the interpretation of Pennsylvania insurance regulations would be quite intrusive.

I do, however, agree with the majority's other ground for holding that this is not a proper case for *Pullman* abstention: *Pullman* abstention should not be employed to avoid a ruling on a claim of federal preemption because such a claim does not call for substantial federal constitutional adjudication. I would base the holding on that ground alone.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 84-1596

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange and USAA CASUALTY INSURANCE COMPANY, A Texas Stock Insurance Company, and USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance Company,

Plaintiffs,

vs.

WILLIAM J. MUIR, III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania,

Defendant.

MEMORANDUM

[Filed September 30, 1985]

This action is a challenge to Section 641 of Pennsylvania's Insurance Department Act of 1921, 40 Pa. C.S.A. § 281. Plaintiff United Services Automobile Association and its affiliates (hereinafter U.S.A.A.) question the constitutionality of this section under the Commerce Clause, Supremacy Clause, Due Process Clause of the Fourteenth Amendment, and Equal Protection Clause of the Fourteenth Amendment, Section 641 effectively prohibits any insurer who is directly or indirectly tied to a bank, public utility, savings and loan company, or the like, from doing business within the Commonwealth of Pennsylvania.

I. BACKGROUND

U.S.A.A. is a reciprocal interinsurance exchange organized and existing under the laws of the state of Texas. Its principal place of business is in San Antonio, but it is licensed to sell insurance in Pennsylvania. In April, 1984, U.S.A.A. Financial Services, a wholly-owned subsidiary of U.S.A.A., filed an application with the Federal Home Loan Bank Board for a *de novo* Federal Savings Bank Charter for the U.S.A.A. Federal Savings Bank. After submission of the appropriate documents, the bank received its charter and began operations in San Antonio on December 30, 1983. This bank does no business in Pennsylvania.

In July, 1984, the Pennsylvania Insurance Department communicated to U.S.A.A. its belief that the operation of the U.S.A.A. Federal Savings Bank placed U.S.A.A. in violation of § 641 of the Insurance Department Act. In subsequent communications, the Insurance Department advised U.S.A.A. that it must divest itself of the Bank in order to continue operating in Pennsylvania.

In October, 1984, U.S.A.A., by its attorney, responded to the Insurance Department's objections to U.S.A.A.'s indirect acquisition of the Bank and offered an interpretation of § 641 that did not prohibit such an affiliation. When the Insurance Department continued to maintain that U.S.A.A. was in violation of § 641, U.S.A.A. instituted this action against the Acting Insurance Commissioner for a declaratory judgment that § 641 is unconstitutional as applied to U.S.A.A.'s ownership of the Bank and for an injunction against enforcement of § 641 against U.S.A.A.

Defendant responded to December 24, 1984 by moving to dismiss the complaint or stay the proceedings on the ground that the federal courts should abstain from deciding this issue. On the same day, the Insurance Department issued an Order to Show Cause, directing plaintiffs

to appear at an administrative hearing for the purpose of determining whether or not plaintiffs have violated § 641(b) of the Insurance Department Act. Plaintiffs opposed the abstention motion and, on January 25, 1985, filed their own motion for summary judgment on preemption grounds. Both of these motions are now before us, but because we find that defendant's abstention motion has merit, we do not reach the preemption issue.

II. ABSTENTION

In certain situations, a federal court may be justified in refusing to exercise its jurisdiction over a cause of action, even though jurisdiction may exist under the constitution and appropriate statutes. Such refusal to exercise jurisdiction is labelled abstention. The abstention doctrine is really a collection of four different doctrines, all concerned with comity, but each deriving from a seminal Supreme Court case and each serving slightly different purposes. The four doctrines are (1) the so-called *Pullman* doctrine, derived from *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941); (2) the *Burford* doctrine, derived from *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); (3) the *Younger v. Harris* doctrine derived from *Younger v. Harris*, 401 U.S. 37 (1971); and (4) the *Colorado River Water Conservation District* doctrine, derived from *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

In the case presently before us, defendant asserts that there are two types of abstention applicable, and we believe that as many as three support our dismissal of this action. These three are the *Pullman*, *Burford*, and *Younger* doctrines. We will address each doctrine in turn.

A. *Pullman Abstention.*

Pullman abstention is exercised by federal courts when, along with the constitutional issue in a case, there is an important state law issue which is unclear, and when

prompt resolution of the unsettled state law question will likely avoid the need for a constitutionally-based decision. The Supreme Court first developed and applied this doctrine in *Railroad Commission of Texas v. Pullman*, *supra*. In that case, the Texas Railroad Commission had ordered that Pullman sleeping cars must be attended at all times by a conductor, rather than a porter as was the custom on less travelled routes. The Commission's order had a racially discriminatory effect, because all conductors were white, while all porters were black.

In exercising *Pullman*-type abstention for the first time, the Supreme Court noted that the purpose of such restraint was to demonstrate " 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 501. In *Pullman*, abstention was warranted because, along with the "substantial constitutional issue" (race discrimination) touching on "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative . . . is open," *id.* at 498, there was a question of the statutory authority of the Railroad Commission to promulgate the discriminatory regulation. Because the law of Texas furnished "easy and ample means for determining the Commission's authority," *id.* at 501, and because the constitutional adjudication could plainly be avoided "if a definitive ruling on the state issue would terminate the controversy," *id.* at 498, the Supreme Court ruled that it was appropriate for the district court to stay the federal proceeding pending resolution of the state issue in the state court.

In cases subsequent to *Pullman*, the Supreme Court and the lower federal courts fleshed out this doctrine, making it clear that this doctrine of abstention

> is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the

> exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

County of Allegheny v. Frank Mashuda Company, 360 U.S. 185, 188-189 (1959). Despite the narrowness of the doctrine, abstention is quite proper "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority v. Midkiff*, 81 L.Ed. 2d 186, 194 (1984).

The overriding prerequisite to exercise of *Pullman* abstention appears, from the case law, to be that the state law question be "unsettled" and potentially dispositive. The Supreme Court has stated

> The relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction."

Hawaii Housing Authority, supra, at 195, quoting *Zwickler v. Koota*, 389 U.S. 241, 251 (1967).

The instant case is one in which there is clearly an unsettled and potentially dispositive issue of state law. The dispute between U.S.A.A. and the Insurance Department has, from the beginning, focused on the interpretation of § 641 of the Insurance Department Act. The Insurance Department relies on subsection (b) to support its mandate that U.S.A.A.'s affiliation with the U.S.A.A. Federal Savings Bank must be severed if U.S.A.A. is to retain its license to sell insurance in Pennsylvania. U.S.A.A. on the other hand, relies on subsections (c) and (a)(1) in arguing that the Insurance Department's interpretation of the Act is erroneous and that it need not divest itself of the Bank.

The language relied on by the Insurance Department, in pertinent part, reads "[N]o lending institution, public utility, bank holding company, savings and loan holding company, or any subsidiary or affiliate of the foregoing, . . . may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State . . . ." 40 Pa. C.S.A. § 281(b). In its enforcement communications with U.S.A.A., the Insurance Department apparently assumed that U.S.A.A. is a bank holding company. Bank holding companies, no matter where their banks are located, are barred from holding an insurance license in Pennsylvania, according to the Insurance Department's interpretation of this section.

Although this interpretation of § 641(b) appears to flow naturally from the clear language of subsection (b), an ambiguity arises when § 641 is read as a whole. Subsection (c) states the purposes of § 641:

> to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers.

40 Pa. C.S.A. § 281(c). "Lending institution" as used in subsection (c), and, indeed, in the whole of § 641, is defined as "any institution that accepts deposits and lends money in the Commonwealth of Pennsylvania . . . ." 40 Pa. C.S.A. § 281(a)(1). Given this definition of lending institution as limited to institutions accepting deposits and lending money in *Pennsylvania*, the clearly stated purpose of § 641 then, is to maintain separation between *Pennsylvania* lending institutions and the insurance business.

The Insurance Deparement's purportedly clear-meaning interpretation of § 641 (b) simply does not mesh with the clearly stated purpose of the section as expressed in

§ 641(c). In fact, as applied to U.S.A.A. and the U.S.A.A. Federal Savings Bank, a Texas lending institution, there is a blatant conflict between the stated purpose of § 641 and the result reached by literal application of subsection (b) to the instant situation. This conflict between subsections (b) and (c) is just the type of ambiguity that triggers the application of *Pullman* abstention. As confirmed by the Third Circuit in a recent ruling, abstention is appropriate even in a case where, as here, the ambiguity appears only when two otherwise clear statutory provisions are read side by side: "The need for state court interpretation results not only from unclear language on the face of a single statute, but also from the juxtaposition of clear, but contradictory state provisions." *Georgevich v. Strauss*, No. 84-5194, slip op. (3d Cir., September 5, 1985).

Once it is established that an ambiguity exists sufficient to call for application of the *Pullman* abstention doctrine, the district court must next determine whether resolution of the state law will avoid the need for a constitutionally-based decision. In this case, decision of the state law question is a logical prerequisite to consideration of U.S.A.A.'s constitutional challenges. If a court were to determine that the clearly articulated purpose of § 641(c) controls the interpretation of § 641(b), then U.S.A.A. would not be in violation of the statute and there would be no need to reach the constitutional issues.

Because we have determined that a potentially dispositive issue of state law exists, we must turn to the final consideration involved in *Pullman* abstention questions: are there the requisite "exceptional circumstances" and would abstention "clearly serve an important . . . interest"? *See County of Alllegheny v. Frank Mashuda Company*, *supra*, at 189. In other words, are there considerations of comity that would mandate state court, rather than federal court, decision of the state law issue?

The answer in this case is yes. Under the McCarran-Ferguson Act, 15 U.S.C. § 1011-1105, power to regulate the insurance industry was given exclusively to the states. The ambiguous state statute in question is part of a comprehensive regulatory scheme implementing the power granted under the McCarran-Ferguson Act. Interpretation of such a statute and resolution of ambiguities therein should be left, therefore, in the first instance, to the state administrative machinery and eventually through appeals, to the state court system. *Accord, Mathias v. Lennon*, 474 F. Supp. 949 (S.D.N.Y. 1979) ("Not only would the New York court's decision have special authority on questions of New York law, but it undoubtedly possesses greater experience in dealing with the highly technical insurance statutes involved here." *Id.* at 955-56).

U.S.A.A. argues that we should not abstain in this case because of the delays inherent in abstention and because of the resulting prejudice to U.S.A.A. and its policyholders. U.S.A.A. claims that, if the state administrative and court system is permitted to decide the state law issue, U.S.A.A. will be deprived of its license to sell insurance in this state pending final adjudication of the constitutional claims. We do not agree with the conclusion that U.S.A.A. will be deprived of its license to its prejudice. Even assuming that the state courts fail to decide the state law issue in U.S.A.A.'s favor, U.S.A.A. will suffer no prejudice because of the availability of appeal and supersedeas procedures. These procedures will assure U.S.A.A. that, before its license is revoked and it is prohibited from doing business in Pennsylvania, it will have the opportunity to be heard on both the state law issue and the constitutional challenges.

U.S.A.A. also objects to abstention on the ground that abstention is inappropriate where the constitutional issue is a preemption claim based on the Supremacy Clause. We cannot accept this contention in this case because

preemption is not the only constitutional claim raised in the complaint, as U.S.A.A. should know.

B. *Burford Abstention.*

The second type of abstention applicable to this case is that exercised in *Burford v. Sun Oil Company*, 319 U.S. 315 (1943). In that case, the Texas Railroad Commission granted Burford a permit to drill four wells. Sun Oil brought an action in district court attacking the validity of the order granting the permit. In ruling that the federal courts should not involve themselves in essentially regulatory matters, the Supreme Court noted the confusion caused by such intervention:

> The very "confusion" which the Texas legislature and Supreme Court feared might result from review by many state courts of the Railroad Commission's orders has resulted from the exercise of federal equity jurisdiction. . . . Delay, misunderstanding of local law and needless federal conflict with the State policy, are the inevitable product of this double system of review.

Burford, supra, at 327. In light of the problems inherent in the exercise of federal court jurisdiction over state regulatory matters when there is an extensive and complicated regulatory scheme, the Supreme Court held that abstention was the most appropriate course of action:

> The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ulti-

> mate review of the federal questions is fully preserved here. . . . Under such circumstances a sound respect for the independence of state action requires the federal equity court to stay its hand.

Id. at 333-34.

From the language of the Supreme Court in *Burford*, and in other cases raising similar issues, it appears that the central requirement for the exercise of *Burford* abstention is the existence of "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976); *Accord, County of Allegheny v. Frank Mashuda Company*, 360 U.S. 185, 189 (1959) ("This Court has also upheld an abstention on grounds of comity with the States when the exercise of jurisdiction by the federal court would disrupt a state administrative process, . . . or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies. . .").

These types of state law questions bearing on important state issues have been recognized in a variety of contexts, including insurance regulation cases. In *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980), the Second Circuit ruled that a dispute between retired employees of Consolidated Mutual Insurance Company and the liquidator of that company should have been left to the state administrative and court systems for determination. In applying *Burford* abstention, the court noted that "the federal courts have abstained in numerous areas where state regulation involved matters of substantial state concern and where state policies were carried out in a statutorily established regulatory program by state officials." The court found that the area of insurance regulation was an area in which state court and administrative systems deserved great deference by federal courts:

> It is . . . highly significant that the state scheme has been adopted pursuant to congressional authorization. In the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1105, Congress mandated that regulation of the insurance industry be left to the individual states. Thus, the administrative and judicial scheme erected by New York to regulate insurance companies, including that part enabling institution and implementation of liquidation proceedings, operates pursuant to an express federal policy of noninterference in insurance matters. Federal courts have therefore been slow to interpret such schemes unless necessary, particularly when federal court action would impinge upon the area in which Congress has recognized the overriding interest of the states.

Levy, supra, at 963-964.

We find that *Burford* abstention is appropriate in this case not only because we agree with the Second Circuit in *Levy* that federal courts should be slow to disrupt state insurance regulatory schemes authorized by the McCarran-Ferguson Act, but also because of the extensive and complicated nature of the state regulatory scheme involved. The policies implemented by § 641 of the Pennsylvania Insurance Department Act are essentially state policies developed to protect state citizens and implement state concerns. As in *Burford* itself, the state in this case provides a "unified method for the formation of policy and determination of cases by the commission and by the state courts." *Burford, supra,* at 333. If the state procedure is followed from the Insurance Department up through the Commonwealth Court and thte State Supreme Court, the state itself will have an opportunity to interpret and mold its own policies in this area of significant state concern, while at the same time, the federal questions will be preserved for ultimate review by the United States Supreme Court, if necessary. No disruption of the State administrative procedures will be

necessary, and the potential for conflicting and confusing federal court and state court rulings will disappear.

We do not agree with U.S.A.A.'s argument that abstention is inappropriate because the factual situation presented here does not involve the "business of insurance" and therefore is not governed by the McCarran-Ferguson Act. Even if § 641 does not directly regulate an "integral part of the policy relationship between the insurer and the insured," *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982), the policies behind § 641 and designed to be implemented by § 641 may have everything to do with the relationship between insurers and insured. Formulation and implementation of such policies are strictly the province of the state's legislative and administrative bodies. To avoid federal interference in such an important area of state functioning, we must abstain from exercising our jurisdiction in this case.

We also do not agree that *Burford* abstention is inappropriate because the administrative proceeding in this case was instituted the same day as the motion to dismiss was filed. It is not a requirement of *Burford* abstention that there be a specific preexisting state proceeding to which the federal court may defer.[1] Rather, all that is required is that there be a pervasive regulatory scheme and a procedure within that scheme through which plaintiff's complaints may be addressed. *See Meicler v. Aetna Casualty and Surety Company*, 372 F. Supp. 509 (S.D. Texas 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975).

C. *Younger Abstention.*

The final abstention doctrine applicable to this case is the one derived from the *Younger v. Harris* case and

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[1] Such a proceeding is required when exercising *Younger* abstention, however. This requirement will be discussed further in section C, *infra*.

its progeny. Although none of the parties in the instant case argued the merits of this doctrine in connection with the motion before us now, our review of the case law on abstention indicates that this third type of abstention is also applicable.

Younger abstention, originally a doctrine applicable only to actions brought in a federal court to enjoin state criminal proceedings, has broadened in recent years to include even federal actions to enjoin ongoing state administrative proceedings. *See, Williams v. The Red Bank Board of Education*, 662 F.2d 1008 (3d Cir. 1981). As noted by the Third Circuit in that case, the keystone of the *Younger* absention doctrine is

> the notion of "comity," that is, a proper respect to state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 1014, quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971).

According to the Third Circuit's reading of the *Younger* doctrine in the *Williams* case, *Younger* abstention is appropriate "where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests." *Id.* at 1077. A prerequisite to such abstention, of course, is that there be an existing state proceeding to which the federal court may defer. *Hawaii Housing Authority v. Midkiff*, 81 L.Ed.2d 186, 195 (1984).

In the instant case the state administrative proceeding was instituted after U.S.A.A. filed its complaint in this court. The bare fact that the state proceeding came after

the initial filing in federal court does not render *Younger* abstention inapplicable, however. The Supreme Court stated in the *Hawaii Housing Authority* case that *Younger* abstention is appropriate "when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court.'" *Id.* at 195, quoting *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). The state Order to Show Cause was issued by the Insurance Department in the instant case on the same day that defendant filed his motion to dismiss in federal court. This motion to dismiss was the first motion filed in the case. We do not believe that the mere filing of a motion means that proceedings of substance on the merits have taken place in federal court. Further, although the Order to Show Cause was not issued until December 24, 1984, the administrative enforcement machinery began rolling in July and August, 1984 when the Insurance Department formally communicated to U.S.A.A. its belief that U.S.A.A. was in violation of § 641.

Given that we find that there is a preexisting state administrative proceeding, we must next engage in the two-step analysis of the propriety of abstention recommended by the Third Circuit in *Williams*. The first step is to determine if the state's interest in going forward with the administrative proceeding without intrusion by the federal courts is sufficiently weighty to mandate *Younger* abstention. *Williams*, 662 F.2d at 1017. As noted in the prior analyses of the other types of abstention, the state's interest in regulating the insurance industry is a substantial one. Pennsylvania has established an extensive and comprehensive scheme for regulating the licensure and operations of insurance companies in this Commonwealth. Regulation of the insurance industry is committed solely to the states by the McCarran-Ferguson Act. Any intervention into this regulatory process by a federal court should not be taken lightly. Because insurance regulation is solely the concern of the states, and

because Pennsylvania has implemented an extensive scheme for that regulation, we find that Pennsylvania's interest in going forward with the administrative proceeding is sufficiently weighty to justify abstention under the *Younger* doctrine.[2]

The second prerequisite to the application of *Younger* abstention is that there be a state administrative forum adequate to vindicate the federal or constitutional claims raised by plaintiff. As we have already noted, Pennsylvania provides such a forum through its system of appeals to the Commonwealth Court and the state Supreme Court.

Because we find that the instant case meets all the prerequisites for *Younger* abstention, and because it involves regulation of the insurance business which is committed to the states, we hold that *Younger* abstention is appropriate in this case.

The appropriate procedure when a district court abstains from deciding a case or an issue more appropriately handled by the state courts is either a stay of the federal court proceedings or dismissal of the case from federal court altogether, depending upon the type of abstention exercised and a "consideration of what is appropriate to the circumstances of that case." *Williams v. The Red Bank Board of Education, supra*, at 1023, n. 15. Because we find today that the state administrative and court systems provide an opportunity for U.S.A.A. to raise all

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[2] Mathias v. *Lennon*, 474 F.Supp. 949 (S.D. NY 1979), another district court case, also held that *Younger* abstention was appropriate in the context of an insurance dispute where there was a preexisting administrative proceeding. In that case the court said "[t]he fact that this case seeks to enjoin a ruling in a pending state proceeding, brought by a state official, implicating an important state concern and in which Mathias is fully able to raise the constitutional claims made here strongly supports the conclusion that the complaint should be dismissed." *Id.* at 956.

of its claims, and because successful pursuit of those claims in the state system will afford U.S.A.A. all of the relief it requests from this court, we will dismiss the action on abstention grounds.

/s/ R. Dixon Herman
R. DIXON HERMAN
United States District Judge

Dated: Sept. 30, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 84-1596

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange and USAA CASUALTY INSURANCE COMPANY, A Texas Stock Insurance Company, and USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance Company,

Plaintiffs,

vs.

WILLIAM J. MUIR, III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania,

Defendant.

ORDER

AND NOW, this 30th day of September, 1985, IT IS ORDERED that Defendant's motion to dismiss be and hereby is granted.

The Clerk of Court is directed to close the file.

/s/ R. Dixon Herman
R. DIXON HERMAN
United States District Judge

No. 89-449 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION,
USAA CASUALTY INSURANCE COMPANY,
USAA LIFE INSURANCE COMPANY,
USAA ANNUITY AND LIFE INSURANCE COMPANY,
Petitioners,

v.

CONSTANCE B. FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, JOHN M. ULRICH, JR., PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC., CHARLES P. LEACH, JR., PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS AND HAROLD E. ALEXANDER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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23 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED *

1. Should this Court grant certiorari to consider a constitutional challenge to a state statute where the United States Court of Appeals for the Third Circuit has remanded the case for a district court determination of the viability of a potentially dispositive state-law claim?

2. Should this Court grant certiorari to consider a constitutional challenge under the dormant Commerce Clause to a state insurance licensing law that (i) applies a non-affiliation requirement equally to both in-state and out-of-state firms and (ii) the United States Court of Appeals for the Third Circuit finds to have no discriminatory effect on out-of-state interests and no effect on the interstate market for the sale of insurance?

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* Respondents Pennsylvania Association of Independent Insurance Agents and Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc. are corporations. Neither has any parent, subsidiary (except wholly-owned subsidiaries), or affiliate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-449

UNITED SERVICES AUTOMOBILE ASSOCIATION,
USAA CASUALTY INSURANCE COMPANY,
USAA LIFE INSURANCE COMPANY,
USAA ANNUITY AND LIFE INSURANCE COMPANY,
Petitioners,

v.

CONSTANCE B. FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, JOHN M. ULRICH, JR., PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC., CHARLES P. LEACH, JR., PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS AND HAROLD E. ALEXANDER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The Petitioners (collectively "USAA") [1] have been licensed by the Pennsylvania Insurance Department to sell insurance in Pennsylvania. In 1983, USAA became a savings and loan holding company when, through a subsidiary, it obtained a charter for, and began operation of, a federal savings bank in San Antonio, Texas. Because Pennsylvania law prohibits the state Insurance Department from licensing savings and loan holding companies, their affiliates, and affiliates of lending institutions to sell insurance in Pennsylvania, the Insurance Department initiated proceedings to determine whether USAA's eligibility for a Pennsylvania insurance license was jeopardized by this new affiliation.[2]

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[1] The Petitioners, United Services Automobile Association, USAA Casualty Insurance Company, USAA Life Insurance Company, and USAA Annuity and Life Insurance Company are affiliated, Texas-based insurance companies doing business in, *inter alia*, Pennsylvania.

[2] Section 641 of Pennsylvania's Insurance Department Act of 1921, as amended, P.L. 1148 (1987), codified at 40 Pa. Stat. Ann. § 281 (Purdon Supp. 1987) ("Section 641"), states that "[n]o lending institution, public utility, bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing, . . . may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State." Section 641(b). The purpose of this prohibition, announced in Section 641(c), is to "help maintain the separation between lending institutions . . . and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers." All parties below, the district court, and the Third Circuit have referred to the Pennsylvania statute as "Section 641," reflecting the fact that it appears as Section 641 of the Pennsylvania Insurance Department Act. USAA now refers to the statute as "Section 281," reflecting its codification in Pennsylvania Statutes Annotated. These Respondents will continue the practice of referring to the law as Section 641.

In defense of its licenses, USAA urged the Pennsylvania Insurance Department to conclude that Section 641 does not apply to it as either a savings and loan holding company or an affiliate of a lending institution because the USAA savings bank assertedly does not do business in Pennsylvania. Letter from Michael L. Browne to Paul Laskow, Chief Counsel, Legal Division, Pennsylvania Insurance Department (Oct. 29, 1984); *see also* Respondent's Post-Hearing Brief at 18, *In re: United Services Automobile Association, et al.*, Docket No. C84-12-5 (before the Insurance Commissioner of the Commonwealth of Pennsylvania).[3]

USAA's defense raised a statutory question of first-impression before the Insurance Department. But before this state-law issue could be resolved, USAA filed a lawsuit in federal district court on November 27, 1984, seeking declaratory and injunctive relief to prevent the Pennsylvania Insurance Department from enforcing Section 641 against it.

The district court dismissed USAA's complaint in 1985 on abstention grounds, noting, *inter alia*, that there "is clearly an unsettled and potentially dispositive issue of state law" because "[t]he dispute between U.S.A.A. and the Insurance Department has, from the beginning, fo-

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[3] Section 641(a) defines a lending institution to be "any institution that does banking business in Pennsylvania." USAA has "argued that the purpose of [Section 641] is limited to preventing financial institutions doing business in *Pennsylvania* from competing or being affiliated with Pennsylvania insurers; as the Bank is based and does business only in Texas, the section [assertedly] does not apply to USAA." *USAA v. Muir*, 792 F.2d 356, 360 (3d Cir. 1986), *cert. denied sub nom. Grode v. USAA*, 479 U.S. 1031 (1987); Appendix to Petition for Writ of Certiorari ("App.") at 72a (emphasis in original). The factual basis for this assertion has not been established, *see USAA v. Foster*, 874 F.2d 926 (3d Cir. 1989); App. at 16a-17a n.11, and these Respondents do not concede either that the state-law claim has been properly presented or that it is in any respect correct.

cused on the interpretation of § 641. . . ." *USAA v. Muir*, App. at 92a.

In reviewing the district court's dismissal, the Third Circuit observed that "state law is . . . unsettled" on whether Section 641 would require the de-licensing of USAA and that USAA offers a "cogent alternative interpretation" of Section 641 that "might well be adopted" by a reviewing court. *USAA v. Muir*, 792 F.2d 356, 362 (3d Cir. 1986), *cert. denied sub nom. Grode v. USAA*, 479 U.S. 1031 (1987); App. at 76a. The appellate court reversed the abstention ruling and remanded for consideration of the merits. This Court denied a petition for certiorari seeking review of that abstention ruling. *Grode v. USAA*, 479 U.S. 1031 (1987); App. at 67a.

On remand, USAA moved for summary judgment on federal constitutional grounds alone. The district court granted one of USAA's motions, ruling that Section 641 violates the dormant Commerce Clause.

On appeal to the Third Circuit, USAA briefed the state-law question. Brief of Appellees and Cross-Appellants, *USAA v. Foster*, Nos. 88-5077, 88-5078 and 88-5121 ("Brief of Appellees") at 18. USAA argued that its view "furnishes an additional reason, based solely on state law, to affirm the district court." *Id.* at 19. The court of appeals declined to address the state-law claim, noting uncertainty both as to its procedural status and factual basis. *USAA v. Foster*, App. at 17a n.11. Consequently, upon ruling the statute constitutional, the court of appeals "remand[ed] this matter to the district court for its determination of the viability of USAA's claim that the state statute is otherwise inapplicable to it." *Id.* at 40a.[4] The court stayed its mandate, upon the request

[4] This appeal was consolidated with an appeal by these Respondents of the decision in *Ford Motor Company, et al. v. Insurance Commissioner*, 672 F. Supp. 841 (E.D. Pa. 1987), *aff'd in part and rev'd in part*, 874 F.2d 926 (3d Cir. 1988). In the consolidated case,

of USAA, to allow USAA to file a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

No reason exists for this Court to grant plenary review of a decision that is interlocutory and merely represents application of this Court's dormant Commerce Clause jurisprudence.

First, consideration of the Commerce Clause issue by this Court is not now necessary. The Third Circuit has remanded for consideration of the viability of a state-law claim that, if resolved in USAA's favor, would end this litigation.

Second, the Third Circuit's interpretation of the dormant Commerce Clause represents an unremarkable application of this Court's precedent. The Third Circuit's ruling is entirely consistent with, and controlled by, this Court's decision in *Exxon Corp. v. Maryland*, 437 U.S. 117, *reh. denied sub nom. Shell Oil Co. v. Maryland*, 439 U.S. 884 (1978). Moreover, USAA—attempting to establish a theoretical conflict among the circuits—has failed to discover any lower court analysis that would require a different holding in this case.

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both the district court and the court of appeals ruled that because the Ford Motor Company ("Ford") subsidiary was acquiring a *failing* savings bank, federal law, 12 U.S.C.A. § 1730a(m) (Supp. 1987), expressly preempted the operation of Section 641 against Ford's insurance company affiliates. *USAA v. Foster*, App. at 23a. The Third Circuit held that the application of Section 641 to affiliates of a federally-chartered savings bank, including the USAA savings bank, is not otherwise preempted. *Id.* at 28a.

REASONS FOR DENYING THE WRIT

I. SUPREME COURT REVIEW AT THIS TIME WOULD BE INTERLOCUTORY AND INAPPROPRIATE IN LIGHT OF A REMAINING, POTENTIALLY DISPOSITIVE, STATE-LAW CLAIM

The petition fails to note the most salient fact concerning this case: That the Third Circuit did not order entry of final judgment but instead remanded for consideration of the viability of a claim concerning the meaning of Section 641, the scope of which has never been passed upon by a state or federal court. *USAA v. Foster*, App. at 40a.

If, as USAA requests, the district court rules Section 641 inapplicable because USAA is simply affiliated with a Texas savings bank that is not doing business in Pennsylvania, then USAA will be entitled to a final judgment (subject to appeal of the state-law issue). If, on the other hand, the lower court does not rule in its favor, then USAA will be entitled to seek redress in this Court from that final judgment. In either event, there is no reason for this Court to consider this case at this time.

Reluctance to review interlocutory decisions is a time-honored principle. Absent "extraordinary inconvenience and embarrassment in the conduct of the cause," this Court has traditionally declined to review decisions that do not finally resolve the litigation. *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893). Thus, in *Brotherhood of Locomotive Firemen v. Bangor & Aroostock Railroad Co.*, 389 U.S. 327, 328 (1967), this Court denied certiorari "because the Court of Appeals remanded the case, [which thus] is not yet ripe for review by this Court."

The pendency of the state-law claim does more than simply render the petition interlocutory. It also robs the petition of all its vitality. In support of its dormant

Commerce Clause claim, USAA assembles a parade of horrible occurrences that will assertedly arise from the Third Circuit's decision. But all of the horribles are premised on the belief—odd from USAA's view—that it is destined to lose the state-law claim. If it prevails in the lower courts, USAA could scarcely claim, for example, that "the Pennsylvania statute will have serious extraterritorial and protectionist consequences." Petition for a Writ of Certiorari ("Petition") at 22. If and when the statute is actually applied to USAA, this Court then will have ample opportunity to determine whether the real-life consequences and the constitutionality of Section 641 justify granting a petition for certiorari.

II. THE COURT OF APPEALS PROPERLY RULED THAT SECTION 641 IS CONSTITUTIONAL

A. The Third Circuit Correctly Applied This Court's Analysis In *Exxon Corp. v. Maryland* To The Facts Of This Case

The Third Circuit carefully reviewed and applied this Court's decision in *Exxon Corp. v. Maryland*, 437 U.S. 117, *reh. denied sub nom. Shell Oil Co. v. Maryland*, 439 U.S. 884 (1978), in concluding that Section 641 passes constitutional muster. That unexceptional application of controlling precedent presents no issue worthy of review in this Court.

Exxon concerned a state statute that barred all oil refiners—both in-state and out-of-state—from owning and operating a Maryland retail service station. Although the statute was facially neutral, there were "no local . . . refiners," 437 U.S. at 125, and so the burden of the state's regulation necessarily fell on out-of-state businesses.

But that disproportionate burden did not render the state law unconstitutional. Far from it, "[t]he fact that the burden of a state regulation falls on some interstate

companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.*, at 126. Rather, as this Court also explained, "the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Id.* Accordingly, the Court held that "[t]he absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce." *Id.*

The Third Circuit correctly recognized that the *Exxon* Court's reasoning precisely fits the facts of this case. In both cases, a state applied a non-affiliation requirement in a manner that permitted an out-of-state firm to choose between continuing an in-state activity or retaining an affiliation between two business enterprises. In both cases, the state law applied its non-affiliation requirement neutrally to both in-state and out-of-state businesses. In both *Exxon* and this case, the state law was ruled to be constitutional.

The Third Circuit's decision thus raises no new issues of constitutional law and conflicts with no precedents of this Court. Nor will there be disruption in the interstate market (even if, as USAA now apparently assumes, the state law applies). The Third Circuit explained that, as was true in *Exxon*, "[t]here is no reason for us to assume that USAA's . . . share of the insurance products sold in Pennsylvania will not be promptly replaced by other interstate insurers." *USAA v. Foster*, App. at 37a.[5]

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[5] USAA argues that *Exxon* should not control because "[t]he record in that case revealed that all gasoline ultimately came from out-of-state refiners, so that the exclusion of refiners from the business of retailing affected the particular parties making retail sales, but not the amount of gasoline moving in interstate commerce." Petition at 21. The Commerce Clause challenge in *Exxon*, however, protested "that the effect of the statute is to

B. The Principles Of *Exxon*, As Applied To The Facts Of This Case, Do Not Conflict With Other Decisions Of This Court.

1. *The Third Circuit applied appropriate Commerce Clause analysis.* USAA claims that the Third Circuit has held that no evenhanded statute can ever violate the Commerce Clause. Petition at 10-11 n.9. That is a mischaracterization of the Third Circuit's decision that studiously ignores the method of analysis actually employed by that court.

This Court has explained that when a statute "regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986); *see* Petition at 10. Both parts of that analysis have been satisfied.

First, Section 641 regulates in the public interest and was not motivated by any discriminatory purpose to disadvantage interstate commerce. The statute serves as a prophylactic measure designed (i) to protect customers from coercive tie-in arrangements, (ii) to guard against unfair anti-competitive activities aimed at non-affiliated insurance agencies and companies, and (iii) to preserve state enforcement resources by applying a simple bright-line standard. *See USAA v. Muir*, App. at 59a; *see also*

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protect in-state independent *dealers* from out-of-state competition." 437 U.S. at 125 (emphasis added). As in *Exxon*, where this Court explained that the loss of interstate, refiner-operated retailers could be replaced by interstate, independent retailers, the Third Circuit in this case explained that the loss of USAA, an interstate supplier of insurance, can easily be replaced by other interstate suppliers of insurance. USAA's contentions to the contrary, *see* Petition at 19-21, are largely based on extra-record predictions concerning the future plans of unidentified companies. Such speculation is worthy of no weight and is, in any event, irrelevant. "[I]nterstate independent dealers," *Exxon*, 437 U.S. at 126, are not affected in any way by Section 641.

n.2 *supra*. Those purposes are equally applicable to in-state and out-of-state institutions.[6]

In asserting now that Section 641 was motivated by a discriminatory, improper purpose, USAA tries to raise an issue not presented to the district court. The district court explained that "USAA does not argue that the Pennsylvania law discriminates against interstate commerce in favor of local business." *USAA v. Foster*, App. at 57a n.6. Indeed, that court was careful to note that USAA "could not make such an argument because Section 641(b) treats all insurance companies and all savings and loans alike, whether or not they are based in Pennsylvania." *Id.* The Third Circuit similarly found the statute to "regulate[] indiscriminately." *USAA v. Foster*, App. at 30a. USAA has proffered no evidence sufficient to lead this Court to reject the factual findings of two courts.[7]

Second, the Third Circuit expressly applied the balancing test favored by USAA when it asked whether the burden imposed by Section 641 is " 'clearly excessive in relation to the putative local benefits.' " *Id.* at 32a (*quoting Pike v. Bruce Church Inc.*, 397 U.S.

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[6] USAA argues that these purposes could be served by a more narrow statute. But again, USAA ignores *Exxon*. The purpose of the Maryland law at issue in that case was to ensure that refiners that operated retail service stations did not have a competitive advantage over non-affiliated retailers. *Exxon*, 437 U.S. at 121. In place of a flat ban on affiliation, Maryland could have simply imposed a code of "fair dealing" to erase any competitive advantage. Like Pennsylvania, it did not do so. Like this Court's *Exxon* decision, the Third Circuit refused to use the Commerce Clause as a means to debate the wisdom—as opposed to the constitutionality—of state economic legislation.

[7] The 1985 testimony of an insurance administrator—made ten years after passage of Section 641—does not show discriminatory intent and is, in any event, insufficient. *See Maine v. Taylor*, 447 U.S. 131, 150 (1986).

137, 142 (1970)). It concluded that the statute had no discriminatory impact because, as *Exxon* demonstrates, the mere fact that out-of-state interests bear a disproportionate share of burden does not invalidate a statute, *id.* at 33a-34a; *see* text at 7-8 *supra*, and because "[n]othing in the records of the present cases, or in the decisions of the district courts . . . indicates that enforcement of § 641 will have the effect of favoring in-state interests over out-of-state interests." *USAA v. Foster*, App. at 38a n.19. To be sure, USAA takes issue with the Third Circuit's factual finding that out-of-state interests will not be disadvantaged. But that attack is primarily based on vague, extra-record predictions, *see* Petition at 20, that could never justify reversal of the Third Circuit's finding.

Indeed, the extent to which Section 641 will have an effect on insurance licensees is entirely within each licensee's control. The most that Section 641 requires is that all Pennsylvania licensees—in-state and out-of-state alike—will have the same choice: whether to choose continued eligibility for a Pennsylvania insurance license over the opportunity to expand their product lines into banking services. As the Third Circuit explained, such companies "cannot hope to invoke the Constitution at every turn to circumvent state regulation and insure unrestricted expansion and protection of their opportunity to obtain the greatest margin of profit." *USAA v. Foster*, App. at 36a. Companies like USAA would simply have to decide whether the expected profits from banking services will be greater or less than the loss of profits from insurance customers in Pennsylvania. That analysis, which is identical to the situation faced by out-of-state oil refiners in *Exxon*, constitutes mere business planning, not the deprivation of constitutional rights. And, of course, that choice is available equally to both out-of-state and in-state institutions. *See Central Mortgage Company v. Insurance Department*, 514 A.2d 956 (Commw. Ct. 1986),

aff'd 534 A.2d 759 (Pa. 1987) (ruling that an insurance agency could not continue to be licensed if acquired by a Pennsylvania lending institution because the in-state lending institution did not qualify for "grandfather" rights created by Section 641).

USAA argues that "[a]s a practical matter, many large interstate insurance companies cannot abandon their insurance activities in such a major market as Pennsylvania." Petition at 16. There is, however, no record evidence to support the view that large, unidentified insurance companies "cannot" come into compliance with Pennsylvania law if required to do so. Based on its speculation, USAA argues that this Court should enforce—as a matter of constitutional law—a national policy favoring financial integration. Petition at 18. Although phrased as a Commerce Clause issue, USAA is really arguing that a state should not be permitted to decide that its insurers must remain separate from banks. *Id.* As the Third Circuit observed, such assertions "are merely the preemption argument dressed in different clothing." *USAA v. Foster*, App. at 38a-39a n.20. The Third Circuit properly rejected USAA's claim that federal law preempts Section 641, *id.* at 28a, and USAA has chosen not to present that issue to this Court.

The governing method of analyzing Commerce Clause claims is thus clear. A nondiscriminatory statute violates the Commerce Clause "[o]nly if the burden on interstate commerce clearly outweighs the State's legitimate purposes . . . ." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (discussing *Exxon Corp. v. Maryland*); *see also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 84 (1987) (contention that law "is discriminatory because it will apply most often to out-of-state entities" fails because "nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly-situated Indiana offerors"). The Third Circuit applied that analysis, and applied it correctly.

2. *The Third Circuit's analysis accords with this Court's Commerce Clause decisions.* Even putting *Exxon* to one side, the Third Circuit applied this Court's analysis in a manner wholly consistent with the line of Commerce Clause decisions that distinguishes between statutes posing permissible and impermissible obligations on interstate firms.

In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), this Court struck down an Illinois statute restricting the takeover of any corporation in which Illinois residents held more than 10% of the stock and which, therefore, could subject a single transaction to multiple, and possibly conflicting, state regulation. In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), this Court upheld a similar Indiana statute that applied only to corporations chartered in that state. The distinction was clearly expressed in the latter case: Because a corporation is chartered in only one state, the Indiana statute could not subject a corporation to inconsistent obligations in the same transaction and it did not, therefore, violate the Commerce Clause. *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69.[8]

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[8] This distinction also explains why USAA is not advantaged by citing a series of circuit court opinions that review state anti-takeover laws that apply to non-resident corporations. *See Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 100 & n.1 (6th Cir. 1989) (state law applicable to corporations not chartered in the state); *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425, 1427 (10th Cir. 1983) (same); *Martin Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 567 (6th Cir. 1982) (anti-takeover statute based on citizenship of shareholders); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1262-63 (5th Cir. 1978), *rev'd on other grounds*, 443 U.S. 173 (1979) (Idaho anti-takeover statute applied to Washington corporation); *see also Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 847-48 (1st Cir. 1989) (affirming issuance of a preliminary injunction where a state law imposing a one-year bar on an attempted takeover of a local corporation by a tender offeror that failed to abide by a disclosure requirement was "not likely" to be constitutional because of the stringency of penalty for non-disclosure).

The doctrine of *CTS Corp.* clearly applies here. Any limitation on the ability of USAA to sell insurance in Pennsylvania has absolutely no impact on its ability to sell insurance policies to persons located elsewhere. The Pennsylvania statute regulates only the sale of insurance policies to Pennsylvania citizens. No other state purports to have an interest in whether USAA, or any other company, is licensed to sell insurance in Pennsylvania. Nor does Section 641 affect the ability of other states to permit bank-insurance affiliations, if they so choose.

Moreover, Pennsylvania law does not impinge on USAA's pricing or sale of insurance in any other state. This narrow focus of Section 641 also distinguishes it from the type of regulation at issue in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), in which the Court struck down a New York law providing that "once a distiller's posted price is in effect in New York, it must seek the approval of the New York State Liquor Authority before it may lower its price for the same item in other States." *Id.*, at 583; *see also Healy v. Beer Institute, Inc.*, 109 S. Ct. 2491, 2500 (1989) (invalidating a Connecticut law that effectively regulated the out-of-state prices of alcoholic beverages).

Section 641 simply follows the traditional rule that regulation of the business of insurance, like the regulation of corporate affairs recognized in *CTS Corp.*, is a matter of local interest. *See* 15 U.S.C. 1011 (McCarran-Ferguson Act) ("Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest"). Moreover, Section 641 reflects the same policy goals that have moved Congress to bar bank holding companies from engaging in general insurance activities. *See* Section 4(c)(8), Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843(c)(8). Indeed, decisions about the permissibility of bank-insurance activities, al-

though subject to federal limitations as applied to certain federally-regulated institutions, have long been made at the state level as well. *See, e.g.*, Ariz Rev. Stat. Ann. § 6-465(A) (Supp. 1987) (restricting financial institution mergers with insurance businesses); Conn. Gen. Stat. Ann. § 38-72 (West 1986) (restricting the power of financial institutions and their affiliates to sell insurance); Va. Code Ann. § 38.2-205 (1986) (same). In other words, Section 641 is an unexceptional statute that deals with subjects of local concern and that is unquestionably constitutional.

3. *No conflict exists among the circuit courts of appeals.* USAA has found no circuit court decision rejecting the method by which the Third Circuit applied *Exxon* and weighed the impact of Section 641 on interstate commerce. Nor has USAA demonstrated that the Third Circuit's analysis expressly differs from the approach of any other circuit. Absent such a showing, USAA bears the heavy burden of demonstrating that the facts of this case would have been decided differently had they been presented to another circuit.

That USAA cannot accomplish. Instead, it relies on a series of anti-takeover cases, *see* n.8 *supra*, and two cases in which a court of appeals struck down local laws regulating sales of milk. But the anti-takeover cases and the milk cases merely illustrate the constitutional difficulty created when a single state imposes its requirements on multi-state transactions. *See Dixie Dairy Co. v. City of Chicago*, 538 F.2d 1303, 1309-11 (7th Cir.), *cert. denied*, 429 U.S. 1001 (1976) (regulation of the production of milk products sold multi-state); *Louisiana Dairy Stabilization Board v. Dairy Fresh Corp.*, 631 F.2d 67, 69 (5th Cir. 1980), *summarily aff'd*, 454 U.S. 884 (1981) (same). That principle, as noted above, has no relation to Section 641, which does not impair the ability of USAA to sell insurance in any other state. Moreover, the fact-based inquiries conducted in other cases, *see, e.g.*,

Dixie Dairy Co. v. City of Chicago, 538 F.2d at 1309, 1311 (court need not give "deference to a legislative judgment which is concededly without a substantial basis in fact") do not, in any way, implicate the validity of the factual analysis made by the Third Circuit on the facts of this case.[9]

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[9] We agree with USAA (although for different reasons), that this Court should not hold this case pending the outcome of *Lewis v. Continental Bank Corporation, prob. juris. noted*, 109 S.Ct. 2446 (1989). *See* Petition at 23 n.23. In *Lewis*, Florida enacted a statute that even-handedly prohibited anyone from establishing an industrial savings bank in Florida. The avowed purpose of this statute was to effectuate the promise of federal law—the Douglas Amendment, 12 U.S.C. § 1842(d)—which, at that time, authorized states to prevent interstate banking by preventing out-of-state bank holding companies from affiliating with in-state banks. Because Florida had used this law to forbid most out-of-state bank holding companies to collect deposits in Florida, the effect of Florida's statute was to prevent only out-of-state bank holding companies from obtaining access to the savings of Florida residents. The Eleventh Circuit ruled that Florida had purposefully discriminated against out-of-state businesses in violation of the Commerce Clause. After this ruling, but before reconsideration, Congress expanded the Douglas Amendment, so that it authorized states to forbid out-of-state bank holding companies to acquire, *inter alia*, industrial savings banks. The Eleventh Circuit, on reconsideration, ruled that this amendment did not moot the challenge.

The issues in *Lewis* differ markedly from those in *USAA v. Foster*. The Commerce Clause issue in *Lewis* demands resolution of the interplay between federal law, which authorizes states to purposefully discriminate against interstate banking, and the Commerce Clause. *Lewis* also presents an issue of square conflict in the courts; whether attorneys fees are available under 42 U.S.C. § 1988 for a Section 1983, 42 U.S.C. § 1983, suit that successfully asserts Commerce Clause challenges. The issue of attorneys fees has not been raised or addressed in the *USAA* case. And finally, *Lewis* apparently involves a moot dispute. As the Solicitor General concluded in its brief to this Court in *Lewis*, reversal of the Eleventh Circuit is necessary because Congress' expansion of the Douglas Amend-

CONCLUSION

For the foregoing reasons, this Court should deny USAA's petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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ment to allow states to forbid interstate acquisitions of industrial savings banks moots that case and requires that the Florida statute be reaffirmed.

No. 89-449 (4)

MOTION FILED

OCT 23 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Petitioners,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE FINANCIAL SERVICES COUNCIL, THE CONSUMER BANKERS ASSOCIATION, THE ASSOCIATION OF BANK HOLDING COMPANIES, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND INSURANCE/FINANCIAL AFFILIATES OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The Financial Services Council, the Consumer Bankers Association, the Association of Bank Holding Companies, the American Financial Services Association, and Insurance/Financial Affiliates of America, Inc. respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition. Counsel for petitioners and counsel for respondent Constance Foster, Insurance Commissioner of the Commonwealth of Pennsylvania, have given their consent to the filing of this brief. The consent

of counsel for the Pennsylvania Association of Independent Insurance Agents, which intervened below and is a respondent in this Court, was requested but refused.

The Financial Services Council is a non-profit organization whose membership includes companies from all major segments of the financial services industry, including bank holding companies, savings and loan holding companies, insurance companies, and securities firms, as well as diversified firms engaging in both financial and non-financial activities. This varied membership is bound together by a common commitment to a fairer, more competitive, and more efficient financial services marketplace, one that enhances the ability of all firms to offer consumers low cost and innovative financial products and services in a manner that guarantees the safety and soundness of depository institutions and protects against conflicts of interest, coercive tying, and other improper practices. The Financial Services Council has provided testimony before Congress and has initiated across the country educational programs addressing concerns with respect to the provision of financial services.

The membership of the Financial Services Council includes the Acacia Group, AmBase Corporation, American Express Company, Bankers Trust New York Corporation, Beneficial Corporation, CalFed Inc., Capital Holding Corporation, Chemical Bank, Citicorp, Commercial Credit Company, Dean Witter Financial Services Group, Inc., First Interstate Bancorp, Fleet/Norstar Financial Group, Inc., Ford Financial Services Group, G.E. Financial Services, Household International, John Hancock Mutual Life Insurance Company, J.P. Morgan & Co., Inc., Kemper Financial Services, Inc., KeyCorp, Meridian Bancorp, Inc., Merrill Lynch & Co., Inc., Security Pacific Corporation, and United Services Automobile Association.

The Consumer Bankers Association (CBA) was founded in 1919 to provide a progressive voice for the retail bank-

ing industry. CBA's membership consists of approximately 800 federally insured banks and thrift institutions which hold more than 80 percent of all consumer deposits nationwide and more than 70 percent of all consumer credit held by federally insured depository institutions.

The Association of Bank Holding Companies is a national association of regional and money center bank holding companies that are registered with and regulated by the Board of Governors of the Federal Reserve System pursuant to the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* The Association's membership represents over 70 percent of the commercial banking deposits in the United States and participates in a wide range of insurance activities permissible under federal and state law.

The American Financial Services Association (ASFA) is the nation's largest trade association representing nonbank providers of consumer financial services. Organized in 1916, AFSA represents 572 companies engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned consumer finance companies to the nation's largest financial services, retail, and automobile companies. ASFA's members hold over $143 billion of consumer credit outstanding and over $38 billion in second mortgage credit, representing approximately one quarter of all consumer credit outstanding in the United States.

Insurance/Financial Affiliates of America, Inc. is an organization of financial institutions with an interest in both banking and insurance activities. Members include insurance companies as well as banks and bank holding companies which own subsidiaries engaged in some fashion in the insurance business.

The present case is of particular interest to *Amici* because the Pennsylvania statute upheld by the Third Cir-

cuit interferes directly with the ability of commercial entities to provide needed financial services to consumers across the Nation. No other State has arrogated to itself the power to regulate the *national* financial services market in the manner Pennsylvania has, and that attempt seriously threatens the development of the competitive and efficient financial services market to which *Amici* are committed. Moreover, *Amici*, because of their diverse membership, are uniquely positioned to apprise the Court of the nationwide impact of the Pennsylvania statute.

Accordingly, *Amici* submit that their participation may help ensure that the Court is presented with a full exposition not only of the issues raised in this case but also of the deleterious effect that denial of the writ would have on the orderly, efficient and cost-effective provision of financial services throughout the United States.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-449

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Petitioners,

v.

CONSTANCE FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE FINANCIAL SERVICES COUNCIL, THE CONSUMER BANKERS ASSOCIATION, THE ASSOCIATION OF BANK HOLDING COMPANIES, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND INSURANCE/FINANCIAL AFFILIATES OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Financial Services Council is a non-profit organization whose membership includes companies from all major segments of the financial services industry, including bank holding companies, savings and loan holding companies, insurance companies, and securities firms, as well as diversified firms engaging in both financial and non-financial activities. This varied membership is bound

together by a common commitment to a fairer, more competitive, and more efficient financial services marketplace, one that enhances the ability of all firms to offer consumers low cost and innovative financial products and services in a manner that guarantees the safety and soundness of depository institutions and protects against conflicts of interest, coercive tying, and other improper practices. The Council has provided testimony before Congress and initiated across the country educational programs addressing concerns with respect to the provision of financial services.

The membership of the Financial Services Council includes The Acacia Group, AmBase Corporation, American Express Company, Bankers Trust New York Corp., Beneficial Corporation, CalFed Inc., Capital Holding Corporation, Chemical Bank, Citicorp, Commercial Credit Company, Dean Witter Financial Services Group Inc., First Interstate Bancorp, Fleet/Norstar Financial Group, Inc., Ford Financial Services Group, G.E. Financial Services, Household International, John Hancock Mutual Life Insurance Company, J.P. Morgan & Co. Incorporated, Kemper Financial Services, Inc., KeyCorp, Meridian Bancorp, Inc., Merrill Lynch & Co., Inc., Security Pacific Corporation, and United Services Automobile Association.

The Consumer Bankers Association (CBA) was founded in 1919 to provide a progressive voice for the retail banking industry. CBA's membership consists of approximately 800 federally insured banks and thrift institutions which hold more than 80 percent of all consumer deposits nationwide and more than 70 percent of all consumer credit held by federally insured depository institutions.

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tem pursuant to the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* The Association's membership represents over 70 percent of the commercial banking deposits in the United States and participates in a wide range of insurance activities permissible under federal and state law.

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Insurance/Financial Affiliates of America, Inc. is an organization of financial institutions with an interest in both banking and insurance activities. Members include insurance companies as well as banks and bank holding companies which own subsidiaries engaged in some fashion in the insurance business.

The present case is of particular interest to *Amici* because the Pennsylvania statute upheld by the Third Circuit, Section 641 of the Pennsylvania Insurance Department Act, 40 Pa. Stat. Ann. § 281, interferes directly with the ability of commercial entities to provide needed financial services to consumers across the Nation. No other State has arrogated to itself the power to regulate the *national* financial services market in the manner Pennsylvania has, and that attempt seriously threatens the development of the competitive and efficient financial services market to which *Amici* are committed.

ARGUMENT

The Petition for Certiorari in this case explains the Third Circuit's error in insulating the Pennsylvania statute from Commerce Clause scrutiny solely because it does not—on its face—discriminate against interstate relative to intrastate commerce. *See* Pet. at 9-15. The approach of the court below—automatically upholding any statute that applies equally to interstate and intrastate commerce—nullifies this Court's previously well-established balancing test for assessing the burdens on interstate commerce in light of the local interests sought to be served by such facially neutral regulation.

This Court's decisions make clear that the balancing test applies precisely when the challenged law on its face "regulates evenhandedly to effectuate a legitimate local interest." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In such a case a court is not to uphold the law without further inquiry, as the court below did, but instead is to consider whether the burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.* In answering that question, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id. See Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 109 S. Ct. 1262, 1280, 1282 (1989).

The court below did not engage in this analysis. Had it done so, it could not have properly avoided concluding that the effects of Section 641 on interstate commerce far outweigh the local interests allegedly promoted by the regulation. Indeed, scrutiny of the extent to which those local interests could be promoted without the dramatic impact on interstate activities leads to the conclusion that those interests are pretextual and that the real purpose of the state law mirrors its actual effect: to keep diversified, primarily out-of-state financial services

firms with insurer affiliates from competing with local independent insurance agents in providing services to Pennsylvania residents. Thus, Section 641 is per se invalid as " 'simple economic protectionism' " whose " 'effect is to favor in-state economic interests over out-of-state interests,' " [1] quite apart from the results of balancing the burdens on interstate commerce against the putative local benefits.

In Part I below we set forth the dramatic effects that enforcement of Section 641 would have on the national financial services market, not only in Pennsylvania but far beyond that State's borders. Part II considers the local interests allegedly promoted by the statute, and whether they could be achieved as well without imposing such severe burdens on interstate commerce. Finally, Part III reviews the manner in which Section 641, in practical operation, discriminates against interstate commerce, penalizing out-of-state companies and consumers to protect Pennsylvania independent insurance agents from legitimate competition.

I. Enforcement Of Section 641 Would Have A Dramatic Impact On The *National* Market For Financial Services

At the outset, it is important to recognize that the financial services market has undergone far-reaching changes during the years since the passage of Section 641 in 1974. A large number of diversified financial services firms have emerged and now offer a broad range of insurance, banking, investment, and other services to consumers across the Nation. A 1984 Task Force chaired by then-Vice President Bush noted that "insurance companies * * * have, like investment banking firms, also acquired limited purpose banks, together with securities

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[1] *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 109 S. Ct. at 1280, 1282 (quoting *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978), and *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

brokerage and underwriting firms and other providers of financial services," and concluded that "depositories will increasingly enter activities traditionally limited to investment banking, brokerage and insurance firms, and vice-versa." [2]

As one witness recently testified before Congress:

> [O]ld fashioned compartmentalization of financial services * * * has, in fact, already broken down. Banks now own discount brokerages. They underwrite municipal bonds to a limited degree, and offer money market accounts. Securities firms offer deposit accounts that are readily accessible by checks and debit cards. Many insurance companies no longer advertise as such, but refer to themselves as financial services companies, offering a full range of products to their retail customers. [Testimony of James D. Robinson III, Chairman of American Express, before the Subcommittee on Financial Institutions of the House Committee on Banking, Finance, and Urban Affairs, 100th Cong., 2d Sess., Serial No. 100-40, pt. IV, at 145 (1988).]

With respect to the insurance industry particularly, a 1985 survey conducted by the American Council of Life Insurance found 40 responding life insurance companies that owned or were affiliated with banks and 49 that owned or were affiliated with thrifts.[3] The extent of the insurance industry's affiliations with banks and thrifts is demonstrated by the following statistics: seven of the top 30 life insurers are affiliated with a bank or thrift

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[2] Blueprint for Reform: The Report of the Task Group on Regulation of Financial Services 25-26 (1984), *reprinted in Bush Task Group Report on Regulation of Financial Services: Blueprint for Reform (pt. 1), Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess., at 297 *et seq.* (1985).

[3] *Life Insurance Companies in the Financial Services Market* (American Council of Life Insurance Survey, March-April 1985), at 3.

and represent fully 41 percent of the assets of the top 30;[4] in the property and casualty insurance field, some 22 percent of net premiums written by the top 30 companies in 1988 were written by companies affiliated with a bank or thrift;[5] nationwide, more than 16 percent of new life policies issued during the first six months of 1989 were issued by companies that were affiliated with a bank or thrift;[6] and in Pennsylvania, insurance companies affiliated with banks or thrifts account for at least 17.5 percent of the private automobile insurance market, 14.5 percent of the homeowners insurance market, and 24 percent of life insurance premiums in Pennsylvania.[7]

The foregoing demonstrates that the homogenization among providers of financial services, the trend toward product and demographic diversification by banking, securities, and insurance firms, and the emergence of "supermarkets" within the financial services industry are by now well established.

Pennsylvania's statute stands athwart this national development. The Pennsylvania statute puts a company like petitioner USAA—issuing insurance in Pennsylvania and owning a federal savings bank in Texas—to the choice of doing one or the other but not both, even if the Texas bank has no contact whatever with Pennsylvania residents. Section 641 thus has a direct effect on the market for financial services far beyond Pennsylvania's borders.[8]

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[4] *See* Fortune 376-377 (June 5, 1989).

[5] *See Best's Insurance Reports: Property-Casualty* (1989), at 53B-56B.

[6] Statistics provided by Life Insurance Marketing and Research Association, Inc. of Hartford, Connecticut.

[7] Statistics derived from market share data contained in *A.M. Best Executive Data Service.*

[8] *Cf. Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (striking down Iowa law banning certain double tractor-

Pennsylvania's restriction effectively regulates the organization and conduct of national firms and their manner of doing business outside Pennsylvania. Section 641 dictates that a company wishing to offer insurance in Pennsylvania—the fourth largest market in the country, *see* Pet. at 16—not affiliate with a financial institution anywhere else in the country. This restriction significantly affects the business and financial condition of the insurer and, if the insurer should choose to withdraw its Pennsylvania license, markedly reduces competition and consumer choice in Pennsylvania with respect to insurance products and services. If, on the other hand, the insurer should elect to divest its financial affiliate or affiliates, such divestiture would mean, in addition to substantial economic loss to the insurer, markedly less competition in the financial services market and fewer lending resources in communities in the other 49 States. At a time of significant change in the financial services business, restricting the ability of major entities such as the large insurers to compete can distort the structure of the developing market for years to come.

II. The Local Interests Allegedly Promoted By Section 641 Are Illusory Or Can Be Achieved Without Burdening Interstate Commerce

Weighed against these dramatic effects on the nationwide market for financial services are the local interests advanced by Section 641. The statute was purportedly enacted to protect the insurance industry from unfair concentration, to protect consumers from "coercive tie-ins" by lenders, and to protect the ability of insurance examiners to monitor the insurance industry. *See* Pet. App. 59a. The mere "incantation of a purpose to promote" the public good, however, "does not insulate a state law from Commerce Clause attack." *Kassel* v. *Consoli-*

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trailers when all other midwestern and western States permitted them).

dated Freightways Corp., 450 U.S. at 670 (opinion for plurality by Powell, J.). Under this Court's decisions, whether such local interests outweigh the burdens on interstate commerce turns in part on whether the local interests "could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142.

As noted, the court below—because of its erroneous legal theory—did not scrutinize the purported purposes underlying Section 641, or consider whether they could be achieved with less disruption of interstate commerce. The District Court, however, *did* consider these purposes, in accord with this Court's precedents, and concluded that the alleged concerns underlying the statute were "either not present * * * or [were] readily prevented in ways less burdensome than is prescribed in Section 641(b)." Pet. App. 59a.

With respect to the concern about economic concentration, the District Court cited the testimony of the Pennsylvania Deputy Insurance Commissioner to the effect that such concentration was not a concern on the facts of this case, where the insurer was affiliated with a small out-of-state savings bank. Pet. App. 60a. In fact, the typical insurance company affiliation triggering Section 641 is not with a major bank, but rather—as in this case—with a small thrift institution, presenting no danger of financial concentration.[9]

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[9] Pennsylvania's putative concern about economic concentration in the financial services industry is also unwarranted because this issue has been comprehensively addressed by Congress. A variety of federal statutes, including Section 4 of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843, and Section 10(c) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. § 1730a, regulate permissible affiliations between lending institutions and insurance companies. Moreover, both the language and legislative history of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982), and the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552

With respect to the purported concern about monitoring insurance companies, the District Court concluded that "even in the absence of Section 641(b) the insurance examiners would still be able to examine the solvency of affiliated companies." Pet. App. 60a. Indeed, the trial court noted that federal law mandated that the results of federal bank examinations be made available to state officials to assist them in their duties. *Id.*

Finally, the District Court ruled that there was no danger of coercive tie-ins on the present facts, because USAA's Texas bank had no operations in Pennsylvania. Pet. App. 60a-61a. As noted, the statute's prohibition applies regardless of the location of the affiliated financial institution, but there cannot be a potential tie-in problem with respect to a financial institution located outside the State and doing no business in the State. The fact that Section 641 regulates forms of business organization that do not affect a single Pennsylvania consumer strongly suggests that it was not motivated by a desire to safeguard such consumers but rather to protect in-state insurance business interests from competition.

In addition, Pennsylvania's putative concerns with the danger of "coercive tie-ins" are illusory. Federal law *already prohibits* the kinds of tie-ins at which Section 641 is ostensibly directed.[10] *See* Section 106 of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. §§ 1971-1972 (banks and bank holding companies), and Sections 5(q) and 10(n) of the Home Owners' Loan Act of 1933, as newly reenacted by Section 301 of the Fi-

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(1987), demonstrate unequivocally that Congress has given *careful* and *detailed* consideration to the issue whether—and to what extent—various categories of financial institutions and their affiliates should be permitted to engage in the insurance business.

[10] Both consumers and competitors have an express cause of action to enforce these anti-tying provisions and an incentive to do so, as a prevailing plaintiff will recover treble damages as well as reasonable attorney's fees. *See* 12 U.S.C. §§ 1464(q)(3), 1975.

nancial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA") (savings associations and savings and loan holding companies).[11]

Furthermore, it is clear that there are available alternative means of addressing the tie-in problem that do not entail the severe burdens on interstate commerce imposed by Section 641. Indeed, Pennsylvania insurance law itself provides ample evidence of such an alternative approach. The tie-in problem allegedly underlying Section 641 is most palpably presented with respect to credit insurance. Yet Section 641 explicitly *exempts* "credit life, health and accident insurance" from its scope, permitting insurers affiliated with financial institutions to offer such credit insurance in Pennsylvania. *See* Pet. at 2. The tie-in problem is dealt with more directly in Pennsylvania Insurance Code § 40-63-101 *et seq.* and its implementing regulations, which forbid tie-in sales of credit insurance.

The State has offered no explanation as to why the tie-in problem can be addressed by direct regulation when it is most acute—in the credit insurance area—but not when its danger is more attenuated. The explanation for the exemption of credit insurance in Section 641 seems to be that such insurance is generally not sold by independent insurance agents. Thus, the exemption lays bare the fact that the real purpose of the statute was to protect the markets of those agents, rather than prevent coercive tie-ins. If the latter were the real purpose, it could be achieved much more readily and without excessive burdens on interstate commerce through a direct ban

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[11] The anti-tying provisions applicable to savings associations and savings and loan holding companies are not new with FIRREA but are merely recodifications of pre-existing law. *See* 12 U.S.C. §§ 1464(q), 1730a(n).

—as in the case of Pennsylvania's own regulation of credit insurance tie-ins.[12]

It is important to recognize that the Third Circuit in no way disagreed with the District Court's conclusion that the concerns underlying the challenged statute were either not implicated or could readily be served without the serious burdens on interstate commerce caused by Section 641.[13] Rather, the Court of Appeals simply concluded that there was *no* burden on interstate commerce and therefore no need to scrutinize the validity of the local interests allegedly promoted by the state law.

III. Section 641 Violates The Commerce Clause Because It Discriminates Against Interstate Commerce In Both Purpose And Effect

The transparency of the concerns alleged to underlie Section 641 cannot conceal the true purpose of the statute—to shield independent insurance agents in Pennsylvania against competition from diversified financial services organizations—organizations whose structure and resources allow them in many cases to offer consumers greater convenience, lower costs, and better services. Even the court below acknowledged that the statute "may provide somewhat of a boon to independent insurance agents who sell insurance in Pennsylvania * * *." Pet.

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[12] A variety of alternatives exist which would achieve Pennsylvania's stated objective without discriminating against interstate commerce. For example, in 1985, the National Association of Insurance Commissioners adopted a Model Unfair Trade Practice Act. Section 5(a) of that Act specifies that "[n]o person may require as a condition to the lending of money or extension of credit * * * that the person to whom such money or credit is extended * * * negotiate any contract of insurance or renewal thereof through a particular insurer or group of insurers * * *."

[13] *Cf. Maine* v. *Taylor*, 477 U.S. 131, 144-147 (1986) (deference to District Court findings on issue whether alternative means exist to achieve local purpose without discriminating against interstate commerce).

App. 38a. Those agents know well enough the purpose and effect of Section 641; they intervened in the District Court to defend the statute and protect their insulation from competition. *See* Pet. at 4.

The *Pike* v. *Bruce Church* balancing test is applicable to state regulation that does not discriminate between interstate and intrastate commerce. As explained above, Section 641 fails that test. It is, however, not even clear that the Pennsylvania statute qualifies for balancing. In practical operation, the statute discriminates against interstate commerce, and thus contravenes the Commerce Clause quite apart from any balancing of interstate burdens and purported local benefits.

The protections of the Commerce Clause are not limited to discrimination that appears on the face of a statute. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-354 (1977). "The Commerce Clause forbids discrimination, whether forthright or ingenious," and prohibits state "legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455, 457 (1940). As this Court has often stated, "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984) (citations omitted); *see also Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981).

The court below erroneously concluded, apparently based on the facial neutrality of Section 641, that its enforcement would not have the effect of favoring in-state over out-of-state interests. Instead, the Court of Appeals' principal focus should have been on "the *practical* operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980)

(emphasis supplied). *See, e.g., American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987) (holding state tax unconstitutionally discriminatory despite absence of facial discrimination).

As explained above, the practical effect of Section 641 is to shield independent insurance agents in Pennsylvania against competition from diversified financial services organizations. The court below concluded that this protectionism did not raise Commerce Clause concerns because it applied against lending institutions in Pennsylvania as well as those outside the State:

> To the extent that the regulation infringes upon the commercial association rights of lending institutions outside of Pennsylvania, it infringes upon those same rights of lending institutions within Pennsylvania. In that light, even if § 641 is viewed as "protectionist" of the economic interests of unaffiliated insurers, because it does not afford that protection only to local agents, it is not violative of the Commerce Clause. [Pet. App. 38a (footnote omitted).]

This analysis is flawed in two significant respects. First, to the extent the court below seeks to justify the statute as beneficial to independent insurance agents located outside of Pennsylvania in the same way it is a boon to the homegrown variety, it advances a state interest which has no constitutional legitimacy. In *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), this Court accepted Illinois' interest in protecting its own citizens from the deleterious effects of takeover battles, but, in denouncing the "sweeping extraterritorial effect" of the Illinois antitakeover statute, held that a "state has no legitimate interest in protecting nonresident shareholders." [14]

Second, the Third Circuit's analysis ignores the "practical operation" of Section 641. *Lewis* v. *BT Inv. Man-*

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[14] *Id.* at 644. *See also Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945) (invalidating state law where the "practical effect * * * is to control [conduct] beyond the boundaries of the state").

agers, Inc., 447 U.S. at 37. The vast majority of the diversified financial services organizations affected by Section 641 are not Pennsylvania corporations. Of the 50 largest life insurers, only one is domiciled in Pennsylvania, and—so far as *amici* can determine—it is not presently affected by Section 641.[15] While only an insignificant percentage of the affected entities are Pennsylvania companies, Pennsylvania is a critical insurance market for all national companies. In short, Pennsylvania is a vital market serviced largely by out-of-state companies. Through Section 641, the State has used the leverage of access to its market to force the out-of-state companies not to compete with in-state independent insurance agents through diversification and the offering of a broad range of financial services. As this Court noted recently, however, "shielding in-state industries from out-of-state competition is almost never a legitimate local purpose * * *." *Maine* v. *Taylor*, 477 U.S. at 148.

Pennsylvania has effectively exploited its considerable market power as the fourth largest insurance market in the United States to gain advantages for its resident independent insurance agents at the expense of the rest of the country. The advantages it secures for its independent insurance agents are, for example, at the expense of citizens in Texas, who have fewer lending resources available because USAA cannot accept deposits and lend in Texas and also sell insurance in Pennsylvania. With Section 641, Pennsylvania has impermissibly burdened interstate commerce and interfered with policy choices of other States and the Federal Government. Curbing this kind of behavior is precisely what the Framers of the Commerce Clause intended. *See, e.g.*, The Federalist No. 6 (A. Hamilton) (J. Cooke ed. 1961); 1 The Records of

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[15] *See* Fortune 376-377 (June 5, 1989). The Pennsylvania company is Penn Mutual Life, ranked thirty-ninth.

the Federal Convention of 1787 at 19, 164 (M. Farrand ed. 1911).

* * * *

In a recent decision, this Court noted that both the *per se* test and the balancing test were directed at answering the same underlying question:

> [T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruch Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. [*Brown-Forman Distillers Corp.*, 476 U.S. at 579.]

Here the burdens on interstate commerce are severe and the putative local benefits illusory or readily achievable through alternative means that do not burden interstate commerce, and the actual effect of the statute is to protect Pennsylvania independent insurance agents from out-of-state competition. Whether analyzed under the *per se* test or the balancing test, Section 641 violates the Commerce Clause.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the Petition and reverse the decision below.

Respectfully submitted,

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No. 89-449

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, et al.,

Petitioners

v.

CONSTANCE FOSTER, et al.,

Respondents

RESPONDENT FOSTER'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state statute which prohibits affiliations between banks and insurance companies, and which treats in-state and out-of-state entities identically, violates the Commerce Clause?

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STATEMENT OF THE CASE

1. This is a constitutional challenge to a Pennsylvania statute prohibiting affiliations between banks and insurance companies. Section 641 of Pennsylvania's Insurance Department Act provides that "[n]o lending institution,...bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing...may, directly or indirectly, be licensed...as an insurer or be licensed to sell insurance in this state...." Pa. Stat. Ann., tit. 40, § 281(b)(Purdon 1989 Supp.). United Services Automobile Association and several of its wholly owned subsidiaries--collectively referred to as "USAA"--contend that this statute violates the dormant Commerce Clause.

2. As both of the lower courts recognized, Pennsylvania's statute serves three purposes: protecting the

ability of insurance regulators to monitor adequately the industry; protecting the industry from undue concentration and lack of competition; and protecting consumers from overt and subtle pressure towards "tie-in" sales of insurance. Pet. App. 30a, 59a.

One of the primary concerns of state insurance regulation is maintaining the solvency of insurance companies. When an insurance company is part of a complex of affiliated entities, however, it is impossible for a regulator to determine its financial condition without the power simultaneously to examine the affairs of all its affiliates. C.A. App. 344a.[1] In the case of an insurance company that is

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[1]The designation "C.A. App." refers to the Appendix filed in the Court of Appeals.

affiliated with a bank, no such examination is possible. Therefore state regulators lack any explicit regulatory mechanism to determine with any confidence the solvency of an insurance company that is affiliated with a bank. C.A. App. 348a-349a.

Secondly, bank-insurance company combinations can adversely effect competition in the insurance industry. Banks and other lending institutions have at their disposal extensive cash reserves which they can use to discourage competition and protect their affiliated insurance operations. C.A. App. 346a. Banks can use these cash reserves to subsidize lower than normal insurance rates in an effort to undersell the competition, thereby gaining a larger market share. C.A. App. 347a. Although

the artifically low insurance rates may reduce competition in the short run, these rates cannot be sustained indefinitely. Such anti-competitive tactics will ultimately produce higher rates in the future since the losses sustained by insurance affiliates will ultimately have to be recaptured. Ibid.

Finally, there is a serious risk that banks with insurance affiliates will use their power to influence borrowers' choices among available insurance companies. Ibid. In the long run, these pressures will undermine the ability of insurance companies not associated with banks to compete with those which are, the result again being increased concentration in the insurance industry and lack of choice for consumers. Ibid.

Against this background is the case of USAA. USAA is licensed to sell insurance in Pennsylvania. In 1983, one of USAA's subsidiaries, having received approval from the appropriate federal agencies, began operating a bank. Pet. App. 46a. The USAA Savings Bank currently does no business in Pennsylvania.

3. After USAA began operating its bank, the Pennsylvania Insurance Department began proceedings to revoke USAA's insurance license. Anticipating this move, USAA sought to forestall it by filing this action against the Insurance Commissioner, challenging Section 641 under the Supremacy Clause, the Commerce Clause, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pet. App. 46a-47a. Three associations of independent insurance agents--including a multi-state association of agents from

Pennsylvania, Delaware and Maryland--plus three individual agents, intervened in the action. Pet. App. 47a.

The District Court at first dismissed the complaint on abstention grounds, Pet. App. 88a-103a, but the Court of Appeals reversed and remanded for proceedings on the merits, and this Court denied certiorari. Pet App. 67a-87a.

Back in the District Court, USAA moved for summary judgment on its Commerce Clause and Supremacy Clause Claims, Pet. App. 46a, and the District Court granted the motion. The District Court first rejected USAA's claim that Section 641 was preempted by certain federal statutes under the Supremacy Clause. Pet. App. 47a-57a. The District Court held, however, that Section 641 placed burdens on USAA's interstate commerce that exceeded the

statute's local benefits, and that it thus violated the Commerce Clause. Pet. App. 57a-65a. The District Court declared Section 641 to be unconstitutional and enjoined the Commissioner from further action to revoke USAA's insurance license. Pet. App. 65a-66a.

4. The Court of Appeals affirmed the District Court's holding that Section 641 is not preempted by federal law,[2] Pet. App. 25a-28a, and USAA does not pursue that claim in this Court. Pet. at 7. On the Commerce Clause issue, however, the Court of Appeals reversed the District Court and held that the statute does not violate the dormant Commerce Clause.

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[2]The Court of Appeals consolidated this case with another, Ford Motor Co. v. Insurance Commissioner. Pet. App. 4a. In Ford, the Court of Appeals held that Section 641 was preempted, but only to a very limited extent not relevant to the circumstances of USAA. Pet. App. 19a-25a.

In doing so, the Court of Appeals relied heavily on Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), where the Court upheld against a Commerce Clause attack a Maryland statute which prohibited oil refiners --all of which were from out-of-state-- from operating retail service stations. Pet. App. 321-31, 36a-38a. The Court of Appeals recognized that, as in Exxon, Pennsylvania's statute furthers legitimate state purposes, Pet. App. 30a, and operates in exactly the same way on both in-state and out-of-state entities: "Section 641 places no discriminatory burdens on interstate insurers. It does not add increased costs to them or otherwise distinguish between in-state insurers and out-of-state insurers in the insurance market." Pet. App. 34a.

The Court of Appeals conceded that Section 641 interferes with USAA's chosen strategy for corporate expansion, Pet. App. 36a, but noted that it does the same to Pennsylvania entities, and repeated the Court's admonition in Exxon that "[t]he Commerce Clause [does not] protect[] the particular structure or method of operation in a retail market... the clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulation." Pet App. 38a, quoting Exxon, 437 U.S. at 127 (emphasis added by the Court of Appeals). The Court of Appeals thus concluded that Section 641 does not violate the Commerce Clause.

One issue remained. In the Court of Appeals, USAA had attempted to

raise an issue of state law, namely, that Section 641, properly construed, does not apply to USAA at all. Pet. App. 36a-37a, n. 11. The Court of Appeals had some doubts about whether USAA had in fact preserved this issue, but remanded for the District Court to determine its viability and, if necessary, its merits. Pet. App. 40a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS AN UNEVENTFUL APPLICATION OF EXXON AND PIKE TO THE FACTS OF THIS CASE.

1. In holding that Pennsylvania's statute does not violate the Commerce Clause, the Court of Appeals simply followed Exxon Corp. v. Governor of Maryland, supra, a case which is on all fours with this one. In Exxon, a Maryland statute prohibited affiliations between oil refiners and services stations; in this case, Pennsylvania prohibits affiliations between banks and insurers. As in Exxon, 437 U.S. at 124-25, Pennsylvania's statute furthers legitimate state purposes, Pet. App. 59a; and as in Exxon, 437 U.S. at 126, Pennsylvania's statute makes no distinction whatever between in-state and out-of-state entities. Pet. App. 32a-34a, 38a.

USAA's attempts to distinguish Exxon are unconvincing and unsupported by the record. USAA claims that Pennsylvania's statute, unlike the Maryland statute in Exxon, is "protectionist...in both intent and effect," Pet. at 18, but as both of the courts below pointed out, "Section 641 treats all insurance companies and all savings and loans alike, whether or not they are based in Pennsylvania." Pet. App. at 34a (quoting District Court's opinion). USAA can point to nothing in the record to the contrary; indeed, the only authority USAA cites, the case of Central Mortgage Co. v. Pennsylvania Insurance Department, 100 Pa. Commonwealth Ct. 233, 514 A.2d 956 (1986), aff'd mem., 517 Pa. 64, 534 A.2d 759 (1987), involved the application of Section 641 to prevent the affiliation

of a Pennsylvania insurer with a Pennsylvania bank. The Court of Appeals thus correctly noted that "[n]othing in the record[]...or in the decision[] of the district court[]... indicates that enforcement of § 641 will have the effect of favoring in-state over out-of-state interests." Pet. App. 38a n.19.

Nor can USAA support its assertion that the operation of Section 641 will increase the business of Pennsylvania insurers at the expense of out-of-state firms. Pet. at 21. The record contains no such evidence, and USAA points to none. In the absence of such evidence, the Court of Appeals correctly followed Exxon, 437 U.S. at 127, in refusing "to assume that USAA's ... share of the insurance products sold in Pennsylvania will not be promptly replaced by other interstate insurers." Pet. App. 37a.

Finally, USAA argues at great length that what it calls the "extra-territorial" effect of Pennsylvania's statute violates the Commerce Clause. Pet. at 16-18. Here again, however, the Court of Appeals simply followed Exxon. Pennsylvania's statute forbids affiliations between insurers and (among others) out-of-state banks; Maryland's statute forbade affiliations between service stations and (among others) out-of-state oil refiners. USAA does not try to explain why Pennsylvania's statute is "extraterritorial" while Maryland's statute was not.

2. USAA also argues that the Court should review this case because, according to USAA, the Court of Appeals has forsaken the balancing test for Commerce Clause cases first articulated

by the Court in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Pet. at 9-11. USAA is mistaken.

USAA's argument rests upon a mischaracterization of the Court of Appeals' decision. Despite what USAA says, the Court of Appeals expressly acknowledged and applied the Pike balancing test: "§641 must be upheld if the incidental burden that it imposes upon interstate commerce is not 'clearly excessive in relation to its putative local benefits.'" Pet. App. 32a, quoting Pike, 397 U.S. at 142. In its earlier decision in Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987), upon which the Court of Appeals relied and which USAA also attacks, the Court of Appeals had done the same. Id., 822 F.2d at 405-07. USAA's real

quarrel is not with this alleged failure to apply the balancing test, but with the result the Court of Appeals reached when it applied the balancing test to the facts of this case in light of Exxon. This is not the sort of issue that justifies review by the Court.[3]

II. THE INTERLOCUTORY NATURE OF THE DECISION BELOW MILITATES AGAINST REVIEW BY THE COURT.

Although USAA omits this from its petition, the Court of Appeals remanded this case for the District

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[3]This answers also USAA's claim that there is a conflict among the circuits. Pet. at 12-15. The decisions cited-- mainly striking down state anti-takeover laws in the wake of Edgar v. MITE Corp., 457 U.S. 624 (1982)--do not present any doctrinal conflicts with the Third Circuit. Rather, they are routine applications of Pike and other cases-- mainly Edgar--to the facts of each case, just as this decision is a routine application of Pike and Exxon to the facts of this case.

Court to consider USAA's claim that, as a matter of state law, it is not subject to the prohibitions of Section 641. Pet. App. 16a n. 11, 40a. The respondent does not concede that this claim has been properly preserved or that, if preserved, it is meritorious. Nevertheless, the existence of a state-law claim which, if successful, would make it unnecessary for the Court to reach any constitutional issues, makes this case an exceptionally unattractive candidate for the Court's discretionary review.

CONCLUSION

For the foregoing reasons, respondent Foster asks the Court to deny the writ of certiorari.

Respectfully submitted,

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No. 89-449

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Petitioners,

v.

CONSTANCE FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In its petition for certiorari, USAA showed that the Third Circuit has adopted a Commerce Clause analysis that nullifies the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which applies to evenhanded, nondiscriminatory statutes. Following the approach of its own previous decision in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987), the Third Circuit in this case ignored this Court's mandate to examine the burden on interstate commerce and determine whether it clearly exceeds the statute's local benefits. The court of appeals failed to consider the overall impact of the state statute on interstate commerce, and

instead weighed in the balance only "the degree to which the state action incidentally discriminates against interstate commerce *relative to intrastate* commerce." Pet. App. 32a, quoting *Norfolk Southern*, 822 F.2d at 406 (emphasis added in Pet. App.).

Because the Third Circuit found that the "statute regulated indiscriminately" in making no distinction between in-state entities and all others (Pet. App. 30a), and thus imposed no burden on interstate "relative to intrastate" commerce, it concluded that there was no relevant burden on interstate commerce at all. It thus upheld Pennsylvania's insurance anti-affiliation statute, without even considering the statute's severe consequences in foreclosing all national insurance companies wishing to continue their business in Pennsylvania from affiliating with certain financial institutions wherever located, and in barring entities diversified into the banking and lending industries from competing in the Pennsylvania insurance market.

In opposing review by this Court, the Commissioner and the intervenors make two arguments. First, they contend that the decision below is simply a straightforward application of this Court's Commerce Clause cases and is not in conflict with decisions of other circuits. Second, they maintain that review by this Court would be inappropriate because the Third Circuit's decision is interlocutory. These contentions are without merit.

1. Neither of the briefs in opposition undertakes to defend the Third Circuit's "relative burden" analysis first articulated in *Norfolk Southern* and applied dispositively in this case. Rather, they pretend that no such analysis exists, and argue instead that nothing occurred here other than a routine application of the *Pike* balancing test. Foster Opp. 15; Intervenors' Opp. 10. They note prominently the court of appeals' reference to *Pike* (Pet. App. 29a-30a), but pay no attention to its clear statement that there is no burden to be considered

if the statute treats in-state and out-of-state entities in the same way. Pet. App. 30a.

By ignoring the substance of the court of appeals' analysis, respondents conclude that the opinion below presents no conflict with the decisions of this Court or of other courts of appeals. Foster Opp. 16 n.3; Intervenors' Opp. 13, 15-16. Both briefs note in particular that the court of appeals' decision is consistent with *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). *See* Foster Opp. 16 n.3; Intervenors' Opp. 13. Nothing they say, however, alters the fact that this Court in *MITE* struck down the Illinois anti-takeover statute at issue both on the ground of its extraterritorial effect (457 U.S. at 643), and under the *Pike* balance, on the basis that its asserted justifications were insufficient to outweigh the burdens imposed on commerce. *Id.* at 643-644. In discussing those burdens, the Court in *MITE* referred to the deprivation of the right of individual shareholders to sell their stock at a premium, and to the hindering of "[t]he reallocation of economic resources to their highest valued use," thus impeding efficiency and competition. 457 U.S. at 643. It is precisely these interests in efficiency and competition that are at stake in this case.[1]

Rather than acknowledge that the Third Circuit has rendered Commmerce Clause balancing impotent in the

[1] Other efforts to minimize the conflict posed by the Third Circuit approach are no more persuasive. Respondent Foster (Opp. 16 n.3) asserts—correctly—that all the cases cited by USAA are "routine applications of *Pike*," but goes on to note—incorrectly and unaccountably—that this case is also. Respondent intervenors (Opp. 13 n.8, 15-16) seek to explain the conflicting circuit court decisions as all just illustrative of "the constitutional difficulty created when a single state imposes its requirements on multistate transactions." Of course, those are not the terms in which those opinions are reasoned. And even if they were, it is hard to imagine how the Pennsylvania statute, with its impact on affiliations located anywhere, and its capacity to override the policy judgments of other states (Pet. 18 n.17), would not be objectionable for its similar impact.

only context where it is relevant—that of evenhanded, nondiscriminatory statutes—respondents seek refuge in a superficial reading of this Court's decision in *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978). Foster Opp. 11-14; Intervenors' Opp. 7-8. They rely on the fact that *Exxon* upheld Maryland's bar to pursuit of a particular in-state economic activity (gasoline retailing) by entities also involved in a different, out-of-state, economic activity (petroleum refining), where the statute was nondiscriminatory but had its practical effect against refiners located out of state. Based on this fact, they conclude that *Exxon* is "on all fours" with the present case. Foster Opp. 11.

When one moves beyond these surface similarities, however, it becomes apparent that the balance of burdens against benefits present in *Exxon*, which led the Court to uphold the statute, has almost nothing in common with that presented here. The Court in *Exxon* relied on the fact that the statute could produce no shifting in the source of petroleum from out-of-state to in-state refiners, because there were no in-state refiners. 437 U.S. at 123, 125, 127. Thus, rather than affecting the allocation of sales between interstate and intrastate producers, the statute simply shifted sales among various interstate refiners. There is no reason to believe that this is true here, where Pennsylvania does have in-state insurers whose market share may be enhanced by legislation forcing certain interstate companies to withdraw from the market.[2]

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[2] The Court in *Exxon* made clear that this distinction may be critical in establishing a Commerce Clause violation (437 U.S. at 126 n.16):

> If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in

Further, the interstate consequences in this case go far beyond those in *Exxon*. As suggested in the amicus brief filed in support of the petition by the Financial Services Council and various other organizations concerned about the effects of the Pennsylvania insurance statute, section 281 is fundamentally incompatible with the present trend toward consolidation and integration of financial services. Amicus Br. 5-8. National insurance companies with established businesses in Pennsylvania cannot consider diversification into banking and lending activities—anywhere—unless they are prepared to cease conducting insurance business in Pennsylvania. And entities engaged in banking or lending—no matter where—are foreclosed from competing in the Pennsylvania insurance market. These impediments to evolution in the financial services industry obviously far surpass the consequence in *Exxon* of barring refiners from retailing their own products. As the Court noted in *Exxon*, "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. at 127-128.

On the other side of the ledger, the policies weighing in favor of the state statute also differ substantially. The goal of the statute in *Exxon* was to protect against inequities in gasoline pricing and distribution resulting at the time of the 1973 petroleum shortage. As noted in our petition (at 21 n.22), the vertical affiliation of refiner and retailer is plainly relevant to a perceived problem of unequal retail supply and unfair competition. Notwithstanding respondents' efforts to defend the policies underlying section 281 (Foster Opp. 1-4; Intervenors' Opp. 9-10), one cannot escape the conclusion that the statute was crafted to provide economic cover against competition from diversified and predominantly interstate sellers of insurance. Such protectionist purposes do not enjoy much

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Maryland and, indeed, no demonstrable effect whatsover on the interstate flow of goods.

favor in the balance against the economic burdens they impose. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).[3]

2. The Commissioner (Foster Opp. 16-17) and the intervenors (Intervenors' Opp. 6-7) also urge this Court to deny review because the court of appeals' decision is interlocutory. They point out that the court of appeals did not definitively rule against USAA, but instead remanded the case to the district court for consideration of USAA's claim that as a matter of state law it is not subject to the prohibition of section 281 because its bank is located outside of Pennsylvania. Because of this posture, they maintain that review at this time would be premature and, perhaps, even unnecessary.[4]

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[3] Respondent intervenors argue that USAA is barred from asserting the statute's protectionist nature because of the district court's statement that "USAA does not argue that the Pennsylvania law discriminates against interstate commerce in favor of local business." Intervenors' Opp. 10, quoting Pet. App. 57a n.6. This reflects a confusion about the nature of the relevant burden on interstate commerce that respondents share with the court of appeals. Petitioners have agreed throughout this proceeding that section 281 does not, either on its face or as applied to individual entities, discriminate between in-state and out-of-state entities. But, under this Court's balancing approach, that does not assure passage of Commerce Clause scrutiny. Though the statute draws no distinctions between in-state and out-of-state entities, it may still, as applied to real entities in the competitive marketplace, fall so heavily on the activities of interstate commerce as to outweigh the local benefits of the statute.

[4] The Commissioner and the intervenors do not—and cannot—argue that the Court is legally precluded from granting review simply because the decision below is interlocutory. Under 28 U.S.C. 1254(1), the Court can grant certiorari to review "any"court of appeals case, either "before or after rendition of judgment or decree." This Court has frequently granted certiorari to review interlocutory decisions. *See, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 192-193 (1974); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964).

This argument is incorrect for several reasons. In the first place, the position taken by the Commissioner and the intervenors necessarily assumes that there is a reasonable likelihood that the district court, on remand, will find section 281 inapplicable to USAA. What they fail to point out, however, is that, despite its decision to remand the case (*see* Pet. App. 16a-17a n.11, 40a), the court of appeals itself addressed the state law issue. Specifically, the court of appeals stated:

> [W]e note our view that the intent of § [281] is not ambiguous. That section was designed clearly to proscribe affiliations between all state licensed insurance companies and *any* savings and loans institutions. Accordingly, no detailed factual proceedings are necessary to determine the statute's applicability to Pennsylvania licensed insurance companies that purchase savings and loan institutions. . . . Moreover, on the records of these cases, we can discern no construction of the state statute that would limit its application such that review of the federal constitutional claims would be unnecessary.

Pet. App. 16a (emphasis in original; footnote omitted). *See also* Pet. App. 29a (referring to "§ [281]'s proscription of affiliations between Pennsylvania insurance companies and financial institutions—whether or not located in Pennsylvania"). In light of the court of appeals' pronouncements regarding section 281, respondents are incorrect in arguing that review by this Court would be premature.

Furthermore, in urging the Court to deny review and permit the case to be remanded, the Commissioner and the intervenors totally ignore the serious economic consequences of such a ruling. So long as the Third Circuit decision stands, entities that are currently selling insurance in Pennsylvania are unlikely to commence diversification into financial services covered by the statute's literal language. By the same token, financial entities,

such as banks, that are not already selling insurance in Pennsylvania will likewise be unlikely to seek or be granted entry into that insurance market. Such businesses will instead await the remand and subsequent renewal of the petition to this Court, in order to determine whether the decision below—and the Pennsylvania statute—will be allowed to stand. In short, many decisions by major insurance and banking companies—with very significant consequences for the financial services market—will be distorted because of the cloud created by the court of appeals' decision.

It is no answer to suggest—as do the intervenors (Intervenors' Opp. 7)—that petitioners can ultimately seek review by this Court "[i]f and when the statute is actually applied to USAA." As the proceedings conducted thus far suggest, months or years will pass before petitioners will be in a position to seek review by this Court of a judgment that is final in all respects. This case has been pending for five years, and the Third Circuit decision has already cast its shadow over the financial services industry for six months. Given the importance of the Commerce Clause issue in determining the future course to be pursued by a large number of major insurance companies and banks (*see* Amicus Br. 6-7), further delay is not warranted.

Any further delay would have particularly serious consequences for USAA, which currently faces the threat of having its license revoked by the Commissioner. As the Third Circuit recognized in its original decision holding that abstention was inappropriate (Pet. App. 77a):

> It is uncontested that USAA has an excellent nationwide reputation as an insurer and is financially sound. The threat of a license revocation, a harsh sanction, may suggest in the marketplace fraudulent or illegal activity or financial instability. It could be

> difficult or perhaps impossible for USAA to explain to consumers and to the insurance industry that the license revocation proceedings in Pennsylvania do not represent such a sanction. The threat of revocation might alarm an unknown number of USAA's more than 40,000 Pennsylvania policyholders into cancelling their insurance.

In light of the decision below upholding the constitutionality of section 281, the Commissioner might well decide to institute license revocation proceedings against other companies as well, resulting in similar adverse consequences for such companies.

Finally, apart from its specific impact on the insurance and banking industries, the court of appeals' decision warrants review at the present time for yet another reason. Unless this Court grants review, the decision below will be the controlling law in the Third Circuit for resolving future Commerce Clause challenges to even-handed statutes. As we explained (Pet. 9-15), that decision is contrary to several decisions by this Court and by other courts of appeals. These conflicts will remain uncorrected if the Court denies review and permits the case to be remanded to the district court on the state law question. For this reason alone, review at this time is plainly warranted.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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